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Supreme Court, U.S.
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In The

Supreme Court of the United States

FLORA HOLLAND, WARDEN,

Petitioner,

v.

FRANK E. ADAMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the decision of the court of appeals, holding that Tennessee Supreme Court Rule 39 makes a petition for discretionary review to the supreme court unavailable as a state remedy for exhaustion purposes under 28 U.S.C. § 2254, contrary to this Court's decision in *O'Sullivan v. Boerckel*, when the rule does not remove such a remedy as an option in Tennessee's established appellate review process?

2. Assuming that Tennessee Supreme Court Rule 39, adopted in 2001, eliminates discretionary review as an "available" state remedy, is the decision of the court of appeals, applying the rule retroactively to remove Adams' 1993 procedural default for failure to raise his claim in such a petition, contrary to this Court's decision in *O'Sullivan v. Boerckel*?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of Flora Holland, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is published at 330 F.3d 398. The memorandum opinion of the district court relevant to Adams' confrontation-rights claim (App. 23) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on May 20, 2003. (App. 1) Petitioner's timely request for rehearing was denied on August 27, 2003. (App. 66) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is 28 U.S.C. § 2254, the pertinent portions of which are reproduced in the appendix. (App. 67)

STATEMENT OF THE CASE

I. Procedural History

Respondent Frank E. Adams ("respondent" or "Adams") was convicted by a jury in 1991 in the Criminal Court of Davidson County, Tennessee, of murder in the first degree (in the perpetration of a felony), Tenn. Code Ann. § 39-2-202 (1982) (repealed), and two counts of armed robbery, Tenn. Code Ann. § 39-2-501 (1982) (repealed). The trial judge sentenced respondent to consecutive terms of imprisonment – life on the murder count and ten years for each robbery, for a total effective sentence of life plus twenty years. The Tennessee Court of Criminal Appeals affirmed the judgment, *State v. Adams*, 859 S.W.2d 359 (Tenn. Crim. App. 1992), and the Tennessee Supreme Court denied Adams' application for permission to appeal on June 28, 1993. (J.A.[1] 87)

Adams subsequently filed a petition for post-conviction relief. The trial court's judgment denying relief was affirmed, and Adams' application for permission to appeal was denied by the Tennessee Supreme Court. *Adams v. State*, No. 01C01-9609-CR-00401, 1997 WL 803585 (Tenn. Crim. App. Dec. 30, 1997) (app. denied June 8, 1998). (J.A. 89-92)

On June 14, 1999, Adams filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. By order and memorandum entered October 19, 2000, the district court granted the

[1] "J.A." designates the joint appendix filed by the parties in the court of appeals.

warden's motion to dismiss and motion for summary judgment, denied the petition for a writ of habeas corpus, and dismissed the case. (App. 18, 23) The district court also denied a certificate of appealability. (*Id.*)

Adams requested a certificate of appealability from the United States Court of Appeals for the Sixth Circuit. The chief judge denied the request. (App. 63) However, a three-judge panel granted Adams' petition to rehear, vacated the order, and granted a certificate of appealability on two issues. (App. 64)

In an opinion filed April 4, 2003, another three-judge panel affirmed the district court's judgment. (App. 49) Adams filed a petition for rehearing, with a suggestion for rehearing en banc. On May 20, 2003, during the pendency of Adams' petition, the panel issued an "amended" opinion and judgment, this time vacating the district court's judgment and remanding the case for further proceedings consistent with the opinion. (App. 1) Adams promptly withdrew his petition for rehearing. The warden subsequently filed a petition for rehearing, with a suggestion for rehearing en banc, but the petition was denied on August 27, 2003. (App. 66)

II. Facts Relevant to the Petition

1. Adams and Timothy Allen Crowell were indicted jointly for three crimes committed during the early morning hours of February 5, 1989: the armed robbery of Kurt Zimmerman, a clerk at a Nashville convenience store, and the subsequent armed robbery and murder of Thomas Weser, an exchange student at a local university. Crowell's case was severed, and Adams was tried first.

The proof at Adams' trial showed that at about 2:30 A.M. one of the two men robbed Zimmerman with a handgun. The other man remained outside as a "lookout" and "getaway car" driver. At about 3:50 A.M., one of the men robbed and killed Weser, taking his wallet, while the other remained outside in the car. On two separate occasions, Adams admitted being involved in the crimes, but he fingered Crowell as the shooter and described the vehicle they had used. *State v. Adams*, 859 S.W.2d at 361-62.

During the trial, the prosecution established through the testimony of Lisa Cantrell that Adams and Crowell were together shortly before and shortly after the killing. But on cross-examination Cantrell related a statement that she overheard Crowell make to another man immediately after a fight – that "he'd shot someone before and he could shoot him also" – evidence suggesting that Crowell, not Adams, may have shot Weser. To counter this testimony, the prosecution proposed the introduction of the testimony of Detective Mike Smith that Crowell had made a statement that Adams was the person who shot Weser. *Id.*, 859 S.W.2d at 363. Over defense objection, the trial judge ruled the testimony admissible under Rule 806, Tenn. R. Evid., which permits the impeachment of hearsay declarants to the same extent as trial witnesses. *Id.* The jury was instructed to consider the testimony only as it might affect the credibility of Crowell's statement related by Cantrell. The jury convicted Adams of the first-degree murder of Weser and the two armed robberies.

2. On direct appeal to the Court of Criminal Appeals, Adams alleged four errors by the trial court: the admission of his pretrial statements, the consolidation of the indictments for trial, the admission of Detective Smith's

testimony, and the imposition of consecutive sentences. (J.A. 50-71) With respect to Detective Smith's testimony, Adams complained that the admission of the evidence violated his federal and state constitutional rights to confront a witness against him and, alternatively, that the testimony should have been excluded under Rule 403, Tenn. R. Evid., which permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. (J.A. 65) Without specifically addressing the constitutional issue, the Court of Criminal Appeals upheld the admission of the testimony and, finding no reversible error in the record, affirmed the judgment. *State v. Adams*, 859 S.W.2d at 363, 364.

Adams filed an application for permission to appeal in the Tennessee Supreme Court, as permitted by Tenn. R. App. P. 11, but he abandoned any claim of error in the admission of Detective Smith's testimony and raised only an issue as to whether the consolidation of the indictments was harmless error. (J.A. 74-85) The Supreme Court denied the application. (J.A. 87)

3. In his federal habeas corpus case, Adams asserted, *inter alia*, that "[his] confrontation clause rights and his rights to due process were violated by the admission of a statement of his co-defendant, and this constitutional violation was not harmless." (J.A. 228) The warden moved for dismissal of the petition and for summary judgment. Specifically, as to the confrontation-rights claim, the warden requested dismissal because the claim was not presented to the Tennessee Supreme Court for review and, therefore, procedurally defaulted. (R. 28: Memorandum of Law in Support of Respondent's Amended Motion to Dismiss and for Summary Judgment at 8) Adams responded, conceding that the claim was procedurally

defaulted but contending that the default should be excused because appellate counsel rendered ineffective assistance of counsel in his representation before the Supreme Court. (R. 29: Reply to Government's Amended Motion to Dismiss and for Summary Judgment at 16)

The district court granted the warden's motion to dismiss and for summary judgment as to all claims and denied a certificate of appealability. (App. 18, 23) With respect to the confrontation-rights claim in particular, the district court concluded that, as acknowledged by Adams, the claim was procedurally defaulted and that, contrary to Adams' contention, the default was not excused by appellate counsel's alleged ineffective assistance because that claim likewise had been procedurally defaulted. (App. 41-42) Adams applied to the court of appeals for a certificate of appealability, but the application was denied by Chief Judge Martin. (App. 63) Adams filed a petition for rehearing, with a suggestion for rehearing en banc.

While Adams' petition was pending, on June 28, 2001, the Tennessee Supreme Court adopted Rule 39, Rules of the Supreme Court, providing, in part, as follows:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted

> all available state remedies available for that claim.

(App. 68-69) Adams filed a supplemental pleading in support of rehearing, noting the rule and contending that, under the rule, the claims found procedurally defaulted by the district court for failure to present them to the Tennessee Supreme Court were not procedurally defaulted. A three-judge panel of the court of appeals (Norris, Moore, and Cole, JJ.) granted rehearing, vacated the chief judge's prior order denying a certificate of appealability, and granted Adams a certificate of appealability on (1) whether, in light of Rule 39, Adams procedurally defaulted his confrontation-rights claim and (2) if not, whether the admission of the evidence violated Adams' right of confrontation. (App. 64)

After briefing and argument before another panel (Boggs, J., Cole, J., and Battani, J. (District Judge, sitting by designation)), the court of appeals affirmed the district court's judgment. (App. 49) The panel concluded that, while Rule 39 rendered Tennessee Supreme Court review "unavailable" for purposes of the exhaustion requirement for federal habeas corpus petitioners (App. 53-58), the rule did not operate retroactively to prevent the procedural default by Adams in this case. (App. 58-61)

Adams filed a petition for rehearing, with a suggestion for rehearing en banc. Upon consideration of the petition, the same panel issued an "amended" opinion and judgment, this time vacating the judgment of the district court denying habeas relief on procedural default grounds and remanding the case for further proceedings consistent with the opinion. (App. 1) This time the panel concluded

that Rule 39 *did* operate retroactively to prevent the procedural default by Adams in this case. (App. 10-14)

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Despite Adams' failure to present his confrontation-rights claim to the Tennessee Supreme Court in 1993 in an application for permission to appeal – a normal, established part of Tennessee's appellate review process – the Sixth Circuit held that, eight years *after* Adams' default, the Tennessee Supreme Court's adoption of a rule, purporting to make an application for permission to appeal unnecessary for exhaustion purposes, erased the procedural default. But the rule did not, in fact, remove an application for permission to appeal from the arsenal of options available to defendants. This anomalous result is plainly inconsistent with *Boerckel*'s holding that a petition for discretionary review is necessary for exhaustion. Furthermore, the court of appeals' retroactive application of the Tennessee rule grafts a qualification on *Boerckel*'s holding never contemplated by this Court when it decided the case and is patently contrary to the reasoning of that decision.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *O'SULLIVAN V. BOERCKEL*, WHICH REQUIRES EXHAUSTION OF STATE REMEDIES THROUGH A PETITION FOR DISCRETIONARY REVIEW TO THE HIGHEST STATE COURT WHEN SUCH A PETITION IS AN ESTABLISHED PART OF THE STATE'S APPELLATE REVIEW PROCESS.

In *Boerckel*, this Court addressed the issue of "whether a state prisoner must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement" of 28 U.S.C. § 2254(c) (App. 67) "when that court has discretionary control over its docket." 526 U.S. at 839-40, 843. In his federal habeas corpus petition, Boerckel had presented several claims that had been presented to the Illinois intermediate appellate court but not in his application for leave to appeal to the Illinois Supreme Court, *id.* at 840-41, 843, which, under Illinois law, could have granted review as "a matter of sound judicial discretion." *Id.* at 843 (quoting Ill. Sup. Ct. R. 315(a) (1998)).

This Court began its analysis by examining the relevant statutory language of the exhaustion requirement: "Section 2254(c) provides that a habeas petitioner 'shall not be deemed to have exhausted the remedies available in the court of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.'" 526 U.S. at 844 (omission in original). Interpreting "available procedure" to mean the State's "established, normal appellate review process," *id.* at 845, the Court held that a prisoner properly exhausts his claims when he resorts to the normal

measures that constitute "one complete round of the State's established appellate review process." *Id.* The Court concluded that a petition for discretionary review to the Illinois Supreme Court was an "established part of the State's appellate review process." *Id.*

When Adams challenged his convictions on direct appeal in the state courts in 1993, and at all times thereafter, Tennessee's established appellate review process was virtually identical to the Illinois procedure at issue in *Boerckel*: an appeal *as of right* to the Court of Criminal Appeals, with an appeal *by permission* to the Tennessee Supreme Court. *See* Rules 3 and 11, Tenn. R. App. P. Indeed, Tennessee's rule on discretionary review, much like the Illinois rule, provides that an appeal may be taken from an intermediate appellate court to the Tennessee Supreme Court "only on application and in the discretion of the Supreme Court." Rule 11(a), Tenn. R. App. P. The rule also closely resembles the Illinois rule in elaborating on the exercise of this discretion:

> In determining whether to grant permission to appeal, the following, while neither controlling, nor fully measuring the court's discretion, indicate the character of the reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

Id. Just as Boerckel winnowed his claims, Adams presented his confrontation-rights claim to the intermediate appellate court (J.A. 64-68), but abandoned it when he petitioned the state supreme court for review. (J.A. 74-85) Thus, like Boerckel, Adams plainly failed to exhaust an available remedy.

Citing *Boerckel* (App. 27), the district court found that Adams' failure to present the confrontation-rights claim to the Tennessee Supreme Court constituted a procedural default of the claim. (App. 41-42) In light of the clear holding of *Boerckel* that, where a petition for discretionary review is an established part of a State's appellate review process and in light of the fact that a petition for discretionary review under Tennessee's appellate scheme – virtually indistinguishable from the Illinois scheme reviewed in *Boerckel* – constituted an established part of Tennessee's appellate review process in 1993, the district court's finding unquestionably was correct.

The Sixth Circuit's reversal of the district court's procedural default ruling is, therefore, remarkable. Seizing on language in *Boerckel* stating that "nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that the remedy is unavailable," 526 U.S. at 847, the court of appeals held that Tennessee Supreme Court Rule 39 (App. 68), adopted in 2001 and stating that a litigant "shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error," rendered discretionary review by the Tennessee Supreme Court unavailable.

But Rule 39 does not render discretionary review unavailable. Indeed, after adopting Rule 39, the Tennessee Supreme Court left Rule 11 – which provides for an application for permission to appeal and the standards governing the grant of review of such applications – unchanged. The Rules' advisory commission subsequently explained that, while the Court adopted Rule 39 "in

response to *O'Sullivan v. Boerckel,*" Rule 39 "*works no change* to T. R. A. P. 11 itself." Tenn. R. App. P. 11, 2002 Ad. Comm'n Cmt. (emphasis added). Moreover, recent studies demonstrate that approximately 7% to 10% of applications for permission to appeal are granted by the Tennessee Supreme Court. *See Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 1999-2000,* at 9 (2000) (reporting 83 applications granted, 714 denied (10.4% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2000-01,* at 39 (2001) (reporting 69 applications granted, 878 denied (7.3% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2001-02*, at 41 (2002) (reporting 63 applications granted, 772 denied (7.5% granted)). Thus, discretionary review by the Tennessee Supreme Court appears to be more "available" than the discretionary review before the Illinois Supreme Court when *Boerckel* was decided. *See* Br. of Resp't, at *6 n.2, *O'Sullivan v. Boerckel*, No. 97-2048 (U.S. filed Jan. 28, 1999), available at 1999 WL 61669 (indicating that the Illinois Supreme Court grants review in approximately 3% of cases).

Rule 11 remains a viable option for defendants. Notwithstanding the adoption of Rule 39, the Tennessee Supreme Court has maintained its requirement that counsel appointed for an indigent defendant "shall continue to act for the defendant ... in any subsequent proceedings or appeals until the case has been concluded or counsel has been relieved by the court," Tenn. S. Ct. R. 13, § 1(i), and that only by permission of the intermediate appellate court can counsel withdraw "before preparation and filing of an Application for Permission to Appeal in the

Supreme Court. . . . " Tenn. S. Ct. R. 14. Indeed, even after the adoption of Rule 39, the Tennessee Supreme Court continues to recognize "the *right* to seek second-tier review pursuant to Tennessee Rule of Appellate Procedure 11." *State v. Evans*, 108 S.W.3d 231, 234 (Tenn. 2003) (clarifying procedure for delayed Rule 11 appeals) (emphasis added). *See also* Tenn. S. Ct. R. 28, § 9(D)(1)(b) and (2)(b) (as amended by order filed Aug. 25, 2003) (permitting a delayed appeal to the supreme court when "petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure. . . . ")[2]

A state supreme court cannot make discretionary review unavailable by declaring it unnecessary for exhaustion, yet leaving it in place for use by any litigant. While "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available," 526 U.S. at 847, Rule 39 has not made Tenn. R. App. P. 11 review unavailable. In fact, Rule 11 review remains as much a part of Tennessee's established appellate review process as the petition for discretionary review under Illinois' appellate review process. Thus, the Sixth Circuit's decision declaring it unavailable conflicts with this Court's decision in *O'Sullivan v. Boerckel*.

Citing a declaration by the South Carolina Supreme Court, virtually identical to Rule 39, *see In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454 (1990), Justice

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[2] The current version, as amended, is available at http://www.tsc.state.tn.us/opinions/tsc/rulesofcourt/06supct25_end.htm#28.

Souter's concurring opinion in *Boerckel* suggests that this Court left open "the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." 526 U.S. at 850. But *Boerckel* plainly did not hold efficacious a mere declaration that a remedy is unnecessary when that remedy clearly remains available in the ordinary appellate review process to any litigant wishing to use it.

In addition to the South Carolina and Tennessee Supreme Courts, courts in at least three other states have adopted similar rules. *See State v. Sandon*, 777 P.2d 220, 221 (Ariz. 1989) (declaring that prisoners need not petition the Arizona Supreme Court for discretionary review to exhaust state remedies); Ark. Sup. Ct. R. 1-2(h) (providing that appellants in criminal appeals or post-conviction cases "shall not be required to petition for . . . review in the Supreme Court following an adverse determination of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error"); *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam) (concluding that "in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error"). This Court should grant review to remove any doubt whether such rules or

declarations operate to render an otherwise available state remedy unavailable.

II. ASSUMING THAT TENNESSEE SUPREME COURT RULE 39 MAKES DISCRETIONARY REVIEW BY THAT COURT UNAVAILABLE, THE SIXTH CIRCUIT'S APPLICATION OF THE RULE RETROACTIVELY TO ADAMS' 1993 PROCEDURAL DEFAULT IS CONTRARY TO THIS COURT'S DECISION IN *O'SULLIVAN V. BOERCKEL*.

But even assuming that Rule 39 does make Rule 11 review unavailable now, the Sixth Circuit's retroactive application of the rule to Adams' case creates a result never contemplated in *Boerckel* and, indeed, that is contrary to its reasoning. Although Rule 39 by its terms purports to apply to "all appeals from criminal convictions or post-conviction review matters from and after July 1, 1967," the rule cannot alter the objective historical fact that such discretionary review *was available* in 1993. *See Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001) ("While a state may, of course, prospectively change the remedies that are available under state law, if a remedy was available or unavailable at some time in the past, it is difficult to see how that fact can be retroactively altered.") Even the court of appeals acknowledged that "federal courts interpreting Tennessee law have, until the passage of Rule 39, always required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement. . . . " (App. 13) (citing, *e.g.*, *Jones v. Jones*, 76 F.Supp.2d 850, 856-57 (E.D. Tenn. 1999); *Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1080 (M.D. Tenn. 1998), *vacated on other grounds by* 226 F.3d 696 (6th Cir. 2000); *Cole v. Campbell*,

703 F.Supp. 657, 659 (M.D. Tenn. 1988); *Layman v. Russell*, 300 F.Supp. 430, 431 (E.D. Tenn. 1969). Moreover, Adams availed himself of the remedy in 1993 by filing an application for permission to appeal and obtained a ruling from the Tennessee Supreme Court that, "[u]pon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied." (J.A. 87)

Furthermore, central to *Boerckel*'s rule of decision – "requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State," 526 U.S. at 847 – is the rule of comity, which "dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Boerckel*, 526 U.S. at 844 (citations omitted). "Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts," this Court concluded "that state prisoners must give the state courts one full opportunity to resolve any constitutional issue by invoking one complete round of the State's established appellate review process." *Id.* at 845.

Retroactive application of Rule 39, however, serves no comity interest. According to the Tennessee Supreme Court, Rule 39 was adopted to deter criminal and post-conviction relief litigants' "routin[e] petition[ing] . . . for permission to appeal . . . in order to exhaust all available state remedies for purposes of federal habeas corpus litigation." (App. 68) But Rule 39 promotes that interest only when it operates to reduce *future* applications.

Clearly, retroactive application in Adams' case cannot have any beneficial effect upon the Tennessee Supreme Court's docket because that Court was required to dispose of his application in 1993.

On the other hand, retroactive application of Rule 39 could have profound consequences for federal district courts. The court of appeals' decision may subject all habeas claims since 1967 that were determined to be procedurally defaulted for failure to exhaust through an application for discretionary review to similar efforts to undo the defaults. *See Mattis v. Vaughn*, 128 F.Supp.2d 249, 262 (E.D. Pa. 2001) (remarking that holding a similar Pennsylvania Supreme Court rule retroactive "would instead greatly increase the burden on the federal courts without providing any additional relief to the Pennsylvania Supreme Court") (footnote omitted). This Court should grant review to determine whether the retroactive application of such a rule is consistent with the decision in *O'Sullivan v. Boerckel*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Frank E. Adams,
Petitioner-Appellant,

v.

Flora J. Holland, Warden,
Respondent-Appellee.

No. 00-6575

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 99-00519 – Robert L. Echols, Chief District Judge.

Argued: September 11, 2002

Decided and Filed: May 20, 2003

Before: BOGGS and COLE, Circuit Judges;
BATTANI, District Judge.*

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL,

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* The Honorable Marianne O. Battani, United States District Judge for the Eastern District of Michigan sitting by designation.

CRIMINAL JUSTICE DIVISION, Nashville, Tennesse, for Appellee. **ON BRIEF:** Mariah A. Wooten, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennesse, for Appellee.

AMENDED OPINION

BATTANI, District Judge.

Before the court is Petitioner-Appellant Frank Adams's appeal from the denial of his habeas petition by the Middle District of Tennessee, Honorable District Court Judge Robert L. Echols. Appellant now preserves for appeal his claim for habeas relief based on the state trial court's admission of his co-defendant Timothy Crowell's hearsay testimony at trial, arguing that the admission of that statement violated Appellant's rights under the Confrontation Clause of the U.S. Constitution. Appellee argues that Appellant has procedurally defaulted his habeas challenge on this issue by failing to argue it in front of the Tennessee Supreme Court, and alternatively, that the admission of the co-defendant's statements did not violate Appellant's constitutional rights. Appellant now appeals the District Court's ruling that his habeas claim has been procedurally defaulted. We **VACATE** and **REMAND** for further proceedings consistent with this opinion.

I. Factual Background

In February 1991, a jury in Davidson County, Tennessee, found Appellant guilty of the felony-murder of Thomas

Weser and two counts of aggravated robbery, for which Appellant was sentenced to life in prison plus twenty years. In October 1992, the Tennessee Court of Criminal Appeals affirmed those convictions. Appellant then applied for permission to appeal to the Tennessee Supreme Court, but did not specifically mention the Confrontation Clause issue before this court in that application, which was denied in June 1998.

In June 1999, Appellant filed his habeas petition before the District Court. The Magistrate Judge recommended that all of Appellant's habeas claims be dismissed except for his Confrontation Clause claim. The District Court agreed with the Magistrate Judge on all of the issues except for the Confrontation Clause issue; on the latter claim, the District Court found that Appellant had procedurally defaulted the claim by failing to bring it before the Tennessee Supreme Court in his application for permission to appeal. Appellant asked for a Certificate of Appealability from both the District Court and this court, and was denied both requests. He then filed a petition for Rehearing with this court on June 21, 2001. While this petition was pending, the Tennessee Supreme Court promulgated Tennessee Supreme Court Rule 39, which Appellant argues removes the procedural default assessed against his Confrontation Clause claim. Accordingly, on August 16, 2001, this court vacated the denial of Appellant's certificate of appealability, and granted a certificate on the following two issues: 1) whether, in light of Tennessee Supreme Court Rule 39, Appellant's Confrontation Clause claim is procedurally defaulted; and 2) if not, whether the admission of the co-defendant's statements violated Appellant's rights under the Confrontation Clause.

II. Discussion

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *E.g., Miller v. Francis,* 269 F.3d 609, 613 (6th Cir. 2001).

A. Procedural Default

Appellant acknowledges that, were it not for Rule 39, his claim would be procedurally defaulted because review by a state supreme court is normally an "available state remedy" that must be exhausted before a federal habeas petition can be filed, even if the state supreme court has only discretionary appeals. *O'Sullivan v. Boerckel,* 526 U.S. 838, 847-48 (1999). Appellant concedes that he did not bring his Confrontation Clause issue before the Tennessee Supreme Court. Appellant argues, however, that in passing Rule 39, the Tennessee Supreme Court changed the landscape of exhaustion law in Tennessee. The rule reads in relevant part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

Tenn. Sup.Ct. R. 39. Specifically, Appellant argues that Rule 39 removes review by the Tennessee Supreme Court as an "available state remedy" for any habeas claim after July 1, 1967, and that his Confrontation Clause issue has therefore not been procedurally defaulted by his failure to bring it before the Tennessee Supreme Court.

Appellee does not contest that Rule 39 purports to remove Tennessee Supreme Court review as an available state remedy for habeas purposes. Instead, Appellee argues that Rule 39 violates the Supremacy Clause of the U.S. Constitution because it conflicts with federal law as established in *O'Sullivan*. Appellee contends that, because discretionary review is still technically available in the Tennessee Supreme Court, *O'Sullivan* controls, and Rule 39 cannot displace federal law on the question of what counts as available state remedies. Appellee's alternative argument is that, even if Rule 39 did remove Tennessee Supreme Court review as an available state remedy, it did not do so "retroactively" and therefore Appellant's habeas claim is still procedurally defaulted. Specifically, Rule 39 was promulgated after Appellant's habeas petition had been submitted, and was promulgated even after Appellant had applied for a rehearing on the denial of his certificate of appealability. Appellee maintains that Rule 39, at most, removed Tennessee Supreme Court review for habeas petitions brought after its promulgation, and that Appellant's habeas claim therefore remains procedurally defaulted.

1. Rule 39 has made Tennessee Supreme Court review "unavailable"

The Supreme Court has recently held that even discretionary appeals by a state supreme court are available state

remedies that must be exhausted for habeas relief. *O'Sullivan,* 526 U.S. at 847-48. The *O'Sullivan* Court, however, explicitly excepted from its holding cases in which the state has explicitly disavowed state supreme court review as an "available state remedy." *Id.* at 847. In this regard, the Supreme Court stated that "we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." *Id.* The Supreme Court recognized that federal law does not prohibit a state from deciding for itself the availability of a particular state remedy. "The exhaustion doctrine, in other words, turns on an inquiry into what procedures are 'available' under state law . . . there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48.

Rule 39 clearly removed Tennessee Supreme Court review as an antecedent for habeas purposes. By its terms, Rule 39 dictates that once the Court of Criminal Appeals has denied a claim of error, "the litigant shall be deemed to have exhausted all available state remedies available for that claim." Tenn. Sup.Ct. R. 39.

Appellee argues that Rule 39 has not technically made Tennessee Supreme Court review *unavailable,* however, since litigants have not been explicitly prohibited from appealing to the state supreme court. According to Appellee, Rule 39 would only have made Tennessee Supreme Court review "unavailable" if it had used explicit statements such as "a litigant shall hereby not be allowed to petition this Court for review," or "this Court will no longer, under any circumstances, review decisions of the Court of Criminal Appeals rejecting claims of error." Appellee's argument, however, fails to grasp the meaning

of the word "available" as it is used in *O'Sullivan,* and instead dwells upon a hypertechnical interpretation of that term. Appellee's misinterpretation is revealed by the *O'Sullivan* Court's examples of what might constitute making state supreme court review unavailable: namely, rules passed by the Supreme Courts of South Carolina and Arizona. *O'Sullivan,* 526 U.S. at 847. Although the *O'Sullivan* majority declined to rule definitively on whether those rules would change the law on exhaustion and procedural default, it did recognize that the rules were trying to make state supreme court review unavailable in those states for habeas purposes. *Id.* The South Carolina Supreme Court, for example, declared:

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of certiorari upon the Court of Appeals' denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, *a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.*

In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564 (1990) (emphasis added) (footnote omitted). The *O'Sullivan* Court considered this South Carolina rule as trying to remove South Carolina Supreme Court review as an available

state remedy for habeas purposes, but reserved judgment as to whether the rule actually succeeded in doing so. *O'Sullivan,* 526 U.S. at 847-48.

It is worth noting that the highlighted language is essentially identical to that in Rule 39. Specifically, neither rule completely removes state supreme court review as an option for litigants; indeed, the South Carolina rule explicitly allows for the presentation of the claim to its Supreme Court. Both rules, however, establish that Supreme Court review is no longer part of the normal course of review for criminal appeals, and is not necessary for exhaustion of "all available state remedies." *See also State v. Sandon,* 161 Ariz. 157, 158 (1989) ("Once the defendant has been given the appeal to which he has a right [i.e., in the Court of Appeals], state remedies have been exhausted") (internal quotations omitted). The *O'Sullivan* Court pointed out that, contrary to Appellee's assertions, technically available remedies are still not "available" for habeas purposes when "those remedies are alternatives to the standard review process." *O'Sullivan,* 526 U.S. at 844 (citing *Wilwording v. Swenson,* 404 U.S. 249, 249-50 (1971)). Instead, when remedies are taken outside of the normal criminal review process, those remedies become "extraordinary:" technically available to the litigant but not required to be exhausted. *Id.*

Our view of the *O'Sullivan* opinion is bolstered by the concurring opinion of Justice Souter from that case. First, Justice Souter, who joined the majority, also cited the South Carolina rule as an example of a state making its Supreme Court review an "unavailable" state remedy, and echoed the majority opinion's citation of *Wilwording. O'Sullivan,* 526 U.S. at 849-50. Justice Souter made two further crucial observations about the majority opinion.

First, Justice Souter explained that under the majority opinion, a state supreme court did not have to "be subjected to constant applications for a form of discretionary review that the State wishes to reserve for truly extraordinary cases, or else be forced to eliminate that kind of discretionary review." *Id.* at 850. In other words, again contrary to Appellee's argument, a state supreme court can preserve discretionary review of criminal appeals while still dictating that review to be "unavailable" for habeas purposes. Second, Justice Souter stated his understanding "that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.*

Thus, the majority and concurring opinions from *O'Sullivan* lead us to believe that Rule 39 rendered Tennessee Supreme Court review "unavailable" in the context of habeas relief. Moreover, the language quoted above from *O'Sullivan* also indicates that this decision by the Tennessee Supreme Court does not violate the Supremacy Clause. A state law or rule violates the Supremacy Clause only if it explicitly conflicts with federal law. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663 (1993); *accord Southeastern Oakland County Res. Recovery Auth. v. City of Madison Heights,* 5 F.3d 166, 168 (6th Cir. 1993). As quoted above, the Supreme Court has not yet explicitly decided whether a rule like Rule 39 would remove state supreme court review for habeas purposes. *O'Sullivan,* 526 U.S. at 847-49. This statement alone shows that there is no "actual conflict" between Rule 39 and federal law. Even beyond this, however, the language quoted above from

O'Sullivan clearly shows the Supreme Court's view that the question of what constitutes the body of "available state remedies" is one of state law, not one of federal law: "there is *nothing* in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available . . . " *Id.* (emphasis added).

Finally, it should be pointed out that *every* other lower court that has considered, post-*O'Sullivan,* the effect of a rule like Rule 39 has held that such a rule permissibly eliminates state supreme court review as an available state remedy that must be exhausted. The Ninth Circuit found that *O'Sullivan* implicitly overruled its earlier position that Arizona could not remove state supreme court review as an available state remedy to be exhausted. *Swoopes v. Sublett,* 196 F.3d 1008, 1009-11 (9th Cir. 1999). Similarly, the Eighth Circuit held that a Missouri rule clearly stated its intent to place state supreme court review outside the set of available state remedies preceding habeas relief. *Randolph v. Kemna,* 276 F.3d 401, 404 (8th Cir. 2002); *see also Mattis v. Vaughn,* 128 F.Supp.2d 249, 256-61 (E.D. Pa. 2001). Appellee's attempt to rely on *Rodriguez v. Scillia,* 193 F.3d 913, 917 (7th Cir. 1999), is unsuccessful because Illinois has a discretionary appeal system *without* a rule like the one passed in Arizona, Pennsylvania, Missouri or Tennesee, and so O'Sullivan still applies there.

2. Rule 39 operates retroactively to prevent procedural default by Appellant in this case

Next we must address whether Rule 39 applies "retroactively" to Appellant's case in particular. Two Circuit Courts have considered whether a rule like Rule 39 can apply to habeas petitions filed before their promulgation,

and have come to opposite conclusions. Dealing with the Missouri rule, the Eighth Circuit rejected the State's argument that "because the amendment to Rule 83.04 has an effective date of July 1, 2002, its invocation" did not help the petitioner, who filed for habeas relief before that date. *Randolph,* 276 F.3d at 404. The Eighth Circuit based its conclusion on the Rule's language, which indicated that it was not changing Missouri law to exclude state supreme court review as an available remedy, but rather was clarifying what had already been Missouri law. *Id.* "The order recites that 'In order to state the existing law in Missouri, the Court notes that transfer of a case . . . to this Court . . . is not part of the standard review process for the purposes of federal habeas corpus review.'" *Id.* The *Randolph* court reasoned that because the announcement of the Missouri rule purported to clarify the existing law, rather than change it, the rule had applied when the petitioner had filed for habeas relief, and so was not even being applied retroactively in that case. *Id.*

On the other hand, the Third Circuit refused to apply the Pennsylvania rule, passed in May 2000, to remove the procedural default from a habeas petition filed before that date. *Wenger v. Frank,* 266 F.3d 218, 225-226 (3rd Cir. 2001). The Third Circuit based its conclusion on three considerations. First, it looked to the language of the Pennsylvania rule, which announced, "AND NOW, this 9th day of May, 2000 . . . we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal . . . in order to be deemed to have exhausted all available state remedies . . . This Order shall be effective immediately." *Id.* at 224-25 (internal

quotations omitted). The Third Circuit found that language to allow application of the rule only on or after May 9, 2000, because it announced that it would be "effective immediately," not as of some prior date. *Id.* at 225. Based on that same language, the *Wenger* court also found that the Pennsylvania rule had amended Pennsylvania law, and that prior to its passage, state supreme court review had been an available state remedy in Pennsylvania. *Id.* at 226. This, of course, stands in contrast to the language of the Missouri rule, which established that it was clarifying existing law rather than creating different law on the subject. Finally, the Third Circuit invoked policy considerations, surmising that allowing retroactive application of the Pennsylvania rule would not serve the rule's purpose of easing the burden on the state supreme court's docket because the state supreme court had already passed on those petitions filed before the rule. *Id.* at 225-26 (citing *Mattis,* 128 F.Supp.2d at 262). Thus, the rule would merely serve to burden the federal courts with erstwhile dormant habeas cases, without providing any corresponding benefit to the state court system. *Mattis,* 128 F.Supp.2d at 262.

The instant case seems more similar to the one in *Randolph* than in *Wenger* because of the language of Rule 39. Specifically, Rule 39 announced its applicability to "all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." Tenn. Sup.Ct. R. 39. This language clearly distinguishes it from the Pennsylvania rule discussed in *Wenger,* which used only prospective language. Similarly, this language from Rule 39 indicates that it is merely clarifying the state of Tennessee law as it has existed since 1967, not changing the law of available state remedies, making this case like the one in

Randolph and distinguishing it from that in *Wenger.* Indeed, in its order promulgating Rule 39, the Tennessee Supreme Court explicitly stated that it was clarifying rather than changing existing law.

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. *In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes,* we hereby adopt the following Rule 39.

In re: Order Establishing Rule 39, Rules of the Supreme Court of Tennessee: Exhaustion of Remedies (Tenn. Sup.Ct. June 28, 2001). This reading is also bolstered by the Tenn. R. App. P. 11 advisory committee's note, which explains that Rule 39 "works no change to" Tenn. R. App. P. 11, the rule governing appeal to the Tennessee Supreme Court. In short, the language and history of Rule 39 strongly persuades this Court that it should be applied retroactively.

The Court recognizes that federal courts interpreting Tennessee law have, until the passage of Rule 39, always required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement, suggesting that perhaps Rule 39 changed Tennessee law rather than merely clarifying it. *E.g., Jones v. Jones,* 76 F.Supp.2d 850, 856-57 (E.D. Tenn. 1999); *Abdur'Rahman v. Bell,* 999 F.Supp. 1073, 1080 (M.D. Tenn. 1998), *vacated on other grounds by* 226 F.3d 696 (6th Cir. 2000); *Cole v. Campbell,* 703 F.Supp. 657, 659 (M.D. Tenn. 1988); *Layman v. Russell,* 300 F.Supp. 430, 431 (E.D. Tenn. 1969). As the

language quoted from the Order above shows, however, the Tennessee Supreme Court was also cognizant of this federal court history and sought to clarify the law with respect to Rule 39. Finally, this Court notes the policy argument discussed by the Third Circuit in *Wenger,* but respects Tennessee's law on the subject of what constitutes available remedies within its own state, even if it results in increased burden on the federal courts. This is true especially here, where Rule 39 clarifies existing law rather than changing the law. For all of these reasons, this Court applies Rule 39 to Appellant's case and finds that his Confrontation Clause claim is not procedurally defaulted.

B. The request to amend the record

Appellant observes that the record before the District Court omitted the transcript of the closing arguments from his trial. Appellant alleges that the closing argument transcript is replete with evidence that the prosecution relied heavily on Crowell's statements in securing his conviction at trial. Appellant argues that, in order to determine whether he deserves habeas relief, this Court must have the entire trial record before it, especially such material portion as the closing argument. Accordingly, Appellant urges the Court to amend the record before it by adding the closing argument transcript, and offers that the Court has power to so amend the record under Fed. R. App. P. 10(e)(2)(b).

Appellee does not contest the materiality of the closing argument transcript. Rather, Appellee submits that Fed. R. App. P. 10(e) does not authorize this Court to amend the record as Appellant requests. Specifically, Appellee argues that this Court cannot examine evidence

that was before neither the state appellate courts nor the District Court.

Rule 10(e) allows amendment of the record on appeal only under two circumstances: "(1) when the parties dispute whether the record actually discloses what occurred in the District Court and (2) when a material matter is omitted by error or accident." *E.g., United States v. Barrow,* 118 F.3d 482, 487 (6th Cir. 1997). Thus, the purpose of amendment under this rule is to ensure that the appellate record accurately reflects the record before the District Court, *not* to provide this Court with new evidence not before the District Court, even if the new evidence is substantial. *Id.* at 487-88 (citing *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.,* 678 F.2d 636, 641 (6th Cir. 1982)). Apart from Rule 10(e), however, a District Court must make a review of the entire state court trial transcript in habeas cases, and where substantial portions of that transcript were omitted before the District Court, a habeas case should be remanded to the District Court for consideration in light of the full record. *Hall v. Arbogast,* No. 88-5529, 1989 WL 119371, at **1 (6th Cir. Oct. 12, 1989) (citing *Townsend v. Sain,* 372 U.S. 293, 319 (1963)).

Although there is no published Sixth Circuit law on the subject, the above citation from *Hall* indicates that the entire trial transcript, including the closing arguments, should have been reviewed by Judge Echols, and that the case should now be remanded back to the District Court for review in light of the full record. The other Circuit Courts that have considered the issue have unanimously adopted this approach. *Magouirk v. Phillips,* 144 F.3d 348, 362-63 (5th Cir. 1998); *Aliwoli v. Gilmore,* 127 F.3d 632, 633-34 (7th Cir. 1997); *Beck v. Bowersox,* 257 F.3d 900,

901-02 (8th Cir. 2001); *Jones v. Wood,* 114 F.3d 1002, 1008 (9th Cir. 1997) (citing *Vicks v. Bunnell,* 875 F.2d 258, 259 (9th Cir. 1989) ("the court must at least have the entire trial transcript" to make a habeas determination)). Appellee contends that these cases are inapposite because they deal with situations where at least the reviewing *state* courts had the entire transcripts before them, whereas here, the state appellate courts did not have the full record. Nothing in the language of these cases, however, limits their holdings in this manner; they all stand for the proposition that the District Court *must* have the trial transcript before it when making habeas determinations. Appellee is correct in noting that this Court cannot be the first to review these new transcript portions, i.e., without their having been before the District Court. *E.g., S & E Shipping,* 678 F.2d at 641. This does not mean, however, that this Court should ignore the need to peruse the entire trial transcript, but rather, it indicates that this Court should remand the case to the District Court for consideration in light of the full record. *Hall,* 1989 WL 119371, at **1 ("the district court should review the state transcript. Therefore, the motion to remand is well-taken"); *Beck,* 257 F.3d at 901-02.

C. The Confrontation Clause claim

Also before the court is Appellant's Confrontation Clause claim. As stated above, the appropriate course of action is to remand the case rather than consider the merits of the claim at this time, and so the Court does not yet reach the merits of appellant's habeas claim.

III. Conclusion

For the reasons stated above, we VACATE the judgment of the District Court denying Appellant's habeas petition on procedural default grounds, and REMAND for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK E. ADAMS,	)	
	)	
Petitioner,	)	No. 3:99-0519
v.	)	JUDGE ECHOLS
	)	
FLORA HOLLAND, Warden,	)	
	)	
	)	
Defendant.	)	

ORDER

(Filed Oct. 19, 2000)

Presently pending before the Court is the Magistrate Judge's Report and Recommendation ("R&R") (Docket Entry No. 30), to which both parties have filed objections.[1] Petitioner, an inmate currently in the custody of the Tennessee Department of Corrections, seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on a total of ten separate grounds. This case was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) to conduct proceedings under Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 304 of the Local Rules for Magistrate Proceedings. (Docket Entry No. 9). The Magistrate Judge now recommends that Respondent's Amended Motion to Dismiss and

[1] Petitioner's submission is styled "Petitioner's Motion to Adopt the Magistrate's Report and Recommendation in Part and Petitioner's Objections to the Magistrate's Report and Recommendation." (Docket Entry No. 32). The Court construes this as Petitioner's Objections to the Report and Recommendation and Response to the Respondent's Objections.

for Summary Judgment (Docket Entry No. 27) be granted with respect to nine of Petitioner's claims and denied with respect to one.

Under 28 U.S.C. § 636(b) (1) and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, the Court is required to review the Magistrate Judge's recommendations de novo. The Court may "accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate." R. Gov. Sec. 2254 Cases 8(b); *see also* 28 U.S.C. § 636(b)(1).

After thoroughly reviewing the record in this case, including the Magistrate Judge's R&R and the objections filed thereto, the Report and Recommendation is hereby ADOPTED IN PART, ADOPTED AS MODIFIED IN PART, and REJECTED IN PART. For the reasons explained in the Memorandum entered contemporaneously herewith, the Court rules as follows.[2]

1.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of ineffective assistance of counsel at trial, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

2.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel on

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[2] There appears to have been some confusion in the submissions and the R&R about how these claims are numbered. The Court numbers them one through ten in the order Petitioner presented them.

direct appeal, the Report is hereby ADOPTED IN PART and REJECTED IN PART, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

3.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of improper consolidation of indictments, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

4.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim that the trial court's jury instruction on reasonable doubt unconstitutionally lowered the prosecution's burden of proof, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

5.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel during post-conviction proceedings, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

6.) Regarding Respondent's Motion to Dismiss Petitioner's claim of a *Miranda* violation, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to

Dismiss this claim, and the claim is hereby DISMISSED.

7.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the admission of his co-conspirator's hearsay statements at trial violated his constitutional right to confront his accusers, the Report is hereby REJECTED, and the Recommendation that the motion be denied is also hereby REJECTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

8.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the trial court improperly ordered Petitioner's sentences to run consecutively, both the Report and Recommendation that the motion be granted are hereby REJECTED AS MOOT because Petitioner has withdrawn the claim. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

9.) Regarding Respondent's Motion to Dismiss Petitioner's claim of actual innocense [sic], the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

10.) Regarding Respondent's Motion to Dismiss Petitioner's claim of insufficient evidence, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

Accordingly, Respondents Motion to Dismiss and for Summary Judgment is GRANTED as to all claims, Petitioner's

Application for a Writ of Habeas Corpus is DENIED, and this case is hereby DISMISSED. Since Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), a certificate of appealability shall not issue.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK E. ADAMS,	)	
	)	
Petitioner,	)	No. 3:99-0519
v.	)	JUDGE ECHOLS
	)	
FLORA HOLLAND, Warden,	)	
	)	
Defendant.	)	

MEMORANDUM

(Filed Oct. 19, 2000)

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for Summary Judgment (Docket Entry No. 27) be granted with respect to nine of Petitioner's claims and denied with respect to one.

Under 28 U.S.C. § 636(b)(1) and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, the Court is required to review the Magistrate Judge's recommendations de novo. The Court may "accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate." R. Gov. Sec. 2254 Cases 8(b); *see also* 28 U.S.C. § 636 (b) (1) .

After thoroughly reviewing the record in this case, including the Magistrate Judge's R&R and the objections filed thereto, the Report and Recommendation is hereby ADOPTED IN PART, ADOPTED AS MODIFIED IN PART, and REJECTED IN PART. For the reasons explained herein, Respondent's Motion to Dismiss and for Summary Judgment is GRANTED as to all claims.

I.

The Court adopts the Magistrate Judge's recitation of the facts (R&R at 2) and procedural history (R&R at 2-5) with one exception. The Court does not adopt the phrase "implying that all claims had been considered" in the following sentence: "In its denial of his application to appeal on June 28, 1993, the [Tennessee Supreme] Court stated that it had considered 'the application for permission to appeal and the entire record in this cause,' implying that all claims had been considered." (R&R at 3). The natural reading of the statement is simply that the Tennessee Supreme Court had considered both the parties' briefs and the entire record – as opposed to just the briefs or just the briefs and an abbreviated version of the record

(like what is often presented to federal courts of appeals in the form of a joint appendix). This Court is unwilling to infer from a routine remark in a standard summary order that the Tennessee Supreme Court had taken the highly unusual step of considering claims that had not been presented to it.

The Court also notes the history of Petitioner's legal representation. Petitioner had two attorneys before trial: Ross Alderman, who was replaced because he left his position, and Mike Engle, who was replaced because Petitioner was unsatisfied with his services. (Docket Entry No. 15, Add. 5, at 4). Petitioner was then represented at trial by two more attorneys: the Metropolitan Public Defender himself, Karl F. Dean, and an Assistant Public Defender, Laura C. Dykes. On direct appeal to the Tennessee Court of Criminal Appeals, Petitioner appears to have been represented again by Mr. Dean and by Jeffrey A. Devasher, who was a Senior Assistant Public Defender and Petitioner's fifth attorney. When the case went to the Tennessee Supreme Court, Petitioner was represented only by Mr. DeVasher. During Petitioner's state post-conviction proceedings before the trial court and the Tennessee Court of Criminal Appeals, Petitioner was represented by a sixth attorney, William C. Roberts, Jr., who was in private practice. Petitioner appealed the denial of post-conviction relief to the Tennessee Supreme Court pro se. In the pending proceedings, Petitioner is represented by his seventh attorney, Mariah A. Wooten, the First Assistant Federal Public Defender.

II.

Because Defendant has attached evidence outside the pleadings in support of its position, the Court treats Defendant's Amended Motion to Dismiss and for Summary Judgment as one for summary judgment. *See* Fed. R. Civ. P. 12(b) ("If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . . "). In ruling on a motion for summary judgment, this Court must construe the evidence produced in the light most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of satisfying the court that the standards of Rule 56 have been met. *See Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact which is disputed. *See Anderson*, 477 U.S. at 248. If so, summary judgment dismissal is inappropriate.

To defeat a properly supported motion for summary judgment, an adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). The non-moving party's burden of providing specific facts demonstrating that there remains

a genuine issue – for trial is triggered once the moving party "show[s] – that is, point[s] out to the district court – that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986).

III.

Petitioner seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, alleging that Respondent holds him in custody in violation of the Constitution and laws of the United States. He has claimed ten such violations. Since procedural default is an issue on most of Petitioner's claims, the Court will first state the relevant rules regarding procedural default and then consider the ten claims seriatim.

Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court. *See* 28 U.S.C. §§ 2254(b)(1), (c). To exhaust a claim, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999). That includes "present[ing] [the] claim[ ] to a state supreme court in a petition for discretionary review." *Id.* at 839-40.

When a federal court is presented with an application for a writ of habeas corpus that contains an unexhausted claim, the court must either dismiss the entire petition or permit the applicant to withdraw the unexhausted claims, leaving the court with an application that contains only exhausted claims. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982). However, if the Petitioner is no longer able to raise the unexhausted claim in state proceedings (for example,

if the time for raising the claim in state court has passed), the claim is procedurally defaulted. *See Harris v. Reed,* 489 U.S. 255, 269-70 (1989). In such a case, the applicant has no state remedies left to pursue, so the court is to dismiss the procedurally defaulted claim but not the entire petition. *See Hannah v. Conley,* 49 F.3d 1193, 1195-96 (6th Cir. 1995).

However, the procedural default of a claim is excused under two circumstances. First, if the petitioner can demonstrate cause for the default and prejudice therefrom the federal court will consider the merits of the claim. *See Edwards v. Carpenter,* 120 S. Ct. 1587, 1591 (2000) (citing *Coleman v. Thompson,* 501 U.S. 722, 750 (1991)). Second, the default is excused if "the habeas petitioner can demonstrate a sufficient probability that . . . failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards,* 120 S. Ct. at 1591 (citing *Coleman,* 501 U.S. at 750).

In the case at bar, Petitioner is unable to return to state court, and therefore any claims that he failed to exhaust are now procedurally defaulted. Tennessee law permits the filing of only one petition for post-conviction relief and directs that subsequent petitions be "summarily dismissed." Tenn. Code Ann. § 40-30-202(c). Moreover, the one-year statute of limitations for filing a petition for post-conviction relief lapsed on May 10, 1996. *See* Tenn. Code Ann. § 40-30-202(a) (petition must be filed within one year of the date of the final action of the highest state appellate court to which an appeal is taken and the statute of limitations is to be strictly enforced); *Carothers v. State,* 980 S.W.2d 215 (Tenn. Crim. App. 1997) (statutes of limitations on post-conviction petitions that had not lapsed by May 10, 1995, the effective date of the 1995 Post-Conviction

Procedure Act, lapse on May 10, 1996). Finally, even if Petitioner could file in the state courts, they would consider the issue waived. *See* Tenn. Code Ann. § 40-30-206(g).

1.

In his first claim for relief, Petitioner contends that his counsel at trial was constitutionally ineffective. *See Strickland v. Washington,* 466 U.S. 668 (1984). He alleges five deficiencies: (1) failing to interview witnesses, (2) failing to challenge inconsistent testimony, (3) failing to investigate and impeach the co-defendant's credibility regarding prior drug use, (4) failing to challenge an in-court identification, and (5) failing to object to the jury instruction on the burden of proof, i.e. the meaning of the term "reasonable doubt." The Warden responds that Petitioner's counsel at trial did not fall below the constitutionally required minimum and moves for summary judgment. The Magistrate Judge agreed with the Warden and recommended that the motion be granted. The Court agrees and adopts the Report on this issue with regard to the first four alleged deficiencies. However, the Court finds the fifth deficiency, failing to object to the jury instruction on "reasonable doubt," to have been procedurally defaulted.

With regard to the first four deficiencies, the Court wishes to include one additional consideration to the Magistrate Judge's Report in order to further justify the basis for its decision. Petitioner devoted most of his argument to try to establish that the alleged deficiencies by his trial counsel would, if true, entitle him to habeas relief. However, the only evidence presented to the Court of the alleged deficiencies is the transcript of Petitioner's post-conviction proceedings

before the Davidson County Criminal Court. The judge who presided over those proceedings made extensive findings of fact which tend to demonstrate (if they do not do so conclusively) that Petitioner's first four alleged deficiencies have no factual basis. Because "a determination of a factual issue made by a State court shall be presumed to be correct," 28 U.S.C. § 2254(e)(1), and Petitioner has not presented a scintilla of evidence to overcome his "burden of rebutting the presumption of correctness by clear and convincing evidence," *id.*, the Court must accept the state trial court's findings of fact as true. Therefore, there is no genuine issue of material fact regarding these four issues.

Petitioner's fifth alleged deficiency in his trial counsel's performance is his failure to object to the jury instruction regarding the definition of the term "reasonable doubt." Although Petitioner raised the claim of ineffective assistance of trial counsel to the Tennessee courts, he never alleged this as one of the grounds for that claim. (Docket Entry No. 7, Addendum 2 at 2, 4; Docket Entry No. 21, Addendum at 4-7, 10, 13-15; Docket Entry 15, Addendum 1 at iv, 4; Docket Entry No. 15, Addendum 5 at 3, 10; Docket Entry No. 15, Addendum 3 at 2, 3). A habeas petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts, without presenting each factual claim. *See Pillette v. Foltz,* 824 F.2d 494, 497-98 (6th Cir. 1987). Surprisingly, the Warden never argues that this claim is procedurally defaulted. Unlike the first four grounds for ineffective assistance of counsel, no additional facts have been provided to the Court to aid in resolving this complicated legal issue by either party or the Magistrate Judge. At first blush, it appears that the Court would have to determine (1)

whether the jury instruction was unconstitutional, and (2) if it was, whether it was ineffective assistance of counsel not to raise it, and (3) if it was, whether the standard for habeas relief in 28 U.S.C. § 2254(d) applies since the claim has not been adjudicated on the merits in any state court proceeding, and (4) if it does, whether the denial of the claim would be "contrary to, or ... an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." If 2254(d) does not apply, the Court would have to determine what standard does apply and whether the alleged error satisfies it.

Since the parties have ignored this procedural default issue, the Court will raise it sua sponte.[2] The Warden has not waived it, *see* 28 U.S.C. § 2254(b)(3) (waiver must be express), and the issue is defaulted because Petitioner has not presented it to any Tennessee state court and his time for doing so has passed. The only remaining issue is whether the default can be excused.

Generally a court that raises the procedural default issue sua sponte should allow the habeas petitioner to present grounds to excuse the default. *See, e.g., Fisher v. Texas,* 169 F.3d 295, 301-02 (5th Cir. 1999). However, the Court should also balance concerns of comity, judicial efficiency, and finality. *See Royal v. Taylor,* 188 F.3d 239,

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[2] It is generally agreed that a habeas court may do so. *See, e.g., Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir. 1999) (joining eight other circuits in so holding). The Sixth Circuit has raised the issue of procedural default sua sponte, *see Elzy v. United States*, 205 F.3d 882, 886 (2000), but it does not appear to have ruled explicitly that a district court may do so.

246 (4th Cir. 1999) (citing *Yeatts,* 166 F.3d at 261, 262, 300-01). In the case at bar, Petitioner was on notice that procedural default was an issue on six other claims, and he briefed the issue extensively with respect to those claims. There is no reason to believe that Petitioner was not aware of the procedural default defense to the jury instruction claim. The Court finds that Petitioner's failure to raise the issue to any Tennessee state court without sufficient excuse for not doing so is fatal. Courts have held that additional briefing is not necessary in similar circumstances. *See, e.g., Elzy,* 205 F.3d at 887; *Ramos v. Keane,* No. 9 CIV. 1604, 2000 WL 12142 (S.D.N.Y. Jan. 6, 2000). Furthermore, the case has already been on this Court's docket for 15 months, and the crime that gave rise to it occurred over 11 years ago. Balancing these concerns, the Court sees little value in ordering yet another round of briefs. The Court holds, therefore, that Petitioner has procedurally defaulted his claim that his trial counsel was constitutionally ineffective in failing to object to the "reasonable doubt" jury instruction and that the default is not excused.

2.

In his second claim for relief, Petitioner contends that his counsel on direct appeal was constitutionally ineffective. The Warden moves to dismiss on the ground that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused on the basis that he can establish cause for the default and prejudice therefrom. (Reply Gov't's Am. Mot., Dismiss and Summ. J. at 5). The Magistrate Judge recommended that the Motion to Dismiss be granted both because Petitioner

has not established a basis to excuse the procedural default and, in the alternative, because Petitioner's counsel on direct appeal was not constitutionally ineffective.

The Court agrees that the motion should be granted but does not reach the merits. Instead, the Court finds that Petitioner has not established a basis to excuse the procedural default. Petitioner has posited the ineffective assistance of his post-conviction counsel as "cause" for his procedural default. However, the Supreme Court rejected that very argument in *Coleman,* 501 U.S. at 752-56. Petitioner asks this Court to carve out a special exception to *Coleman* and hold that ineffective assistance of post-conviction counsel can serve as "cause" to excuse a procedural default when appellate counsel was also constitutionally ineffective. That would simply contradict the plain language of *Coleman*: "We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." 501 U.S. at 755. Because Petitioner had no constitutional right to an attorney during his state post-conviction proceedings, it was impossible for his attorney's performance at the state post-conviction proceedings to be constitutionally ineffective. *See id.,* at 752.

The Court also notes that Petitioner asserts constitutionally ineffective assistance of counsel only during his appeal to the Tennessee Supreme Court, Petitioner's second appeal. (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 4). Although the Warden does not raise it, Petitioner had no right to effective assistance of counsel at that proceeding. A criminal defendant has a right to effective assistance of counsel in his first appeal as of right, *see Evitts v. Lucey,* 469 U.S. 387, 396 (1985), but the

United States Supreme Court has declined to extend the right any further, *see, e.g.*, *Ross v. Moffitt*, 417 U.S. 600 (1974); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Therefore, even if Petitioner could establish "cause and prejudice" to excuse the procedural default, the Court would have to dismiss the claim anyway.

3.

In his third claim for relief, Petitioner contends that the trial court improperly consolidated the indictments, forcing Petitioner to stand trial simultaneously for an armed robbery and a robbery-murder even though the events occurred one hour and twenty minutes apart. Petitioner contends that the consolidation violated his constitutional right to a fair trial as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments. The Warden moves for summary judgment on the ground that consolidation of the indictments was not constitutional error, and even if it was, the error was harmless. The Magistrate Judge ruled that the error was harmless and recommended that the Motion for Summary Judgment be granted. The Court agrees that the motion should be granted but for different reasons.

Despite the parties' discussion of the Tennessee Court of Criminal Appeals' decision that the consolidation of the indictments violated the Tennessee Rules of Criminal Procedure (*see State v. Adams*, 859 S.W.2d 359, 362-63 (1992)), this ruling is not controlling on this Court's consideration of the claim. A federal "district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). As such, the Court's discussion is limited to the due process issue.

With regard to the due process issue, the Court notes that once again the Warden has failed to raise a procedural default. Although Petitioner asserted at trial and to both state appellate courts on direct review that the consolidation of the indictments was improper, he must assert the constitutional, not just the state law, claim to preserve it. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). The Court has been unable to find any constitutional objection to the consolidation of indictments in the trial record. (T.R. 25, 31-35, 44, 71; Tr. 97-126, 145-52, 162-87, 520-21, 750). Furthermore, Petitioner devoted a mere sentence to the constitutional issue in his brief to the Tennessee Court of Appeals (Docket Entry No. 7, Addendum 1 at 37), which essentially ignored the subject, *see Adams,* 839 S.W.2d at 360, 362-63. Finally, when Petitioner presented the matter to the Tennessee Supreme Court, only a general allegation of constitutional violation was mentioned. (Docket Entry No. 7, Addendum 2 at 6). "It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Gray v. Netherland*, 518 U.S. 152, 162 (1996) (citing *Anderson v. Harless,* 459 U.S. 4 (1982)). A grand total of two sentences in three proceedings, particularly when the sentences themselves are nothing more than blanket assertions, does not "fairly present" the issue to the state courts. *See generally Picard v. Connor*, 404 U.S. 270 (1971).

For the same reasons discussed in the portion of this Memorandum addressing Petitioner's allegation that his

trial counsel was constitutionally ineffective, the Court is again inclined to raise the issue sua sponte and rule that the issue is defaulted. However, this time the Warden does not merely fail to raise the procedural default issue, but he concedes (incorrectly) that "the issue is properly before this Court under 28 U.S.C. § 2254(a)." (Mem. Law Supp. Resp't's Am. Mot. Dismiss and Summ. J. at 13). This could be construed as a waiver of the procedural default issue, but "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Nonetheless, some courts have construed similar statements as an "express waiver." *See, e.g., United States v. Cooper*, 965 F. Supp. 1140, 1142 n.3 (N.D. Ill. 1997); *Mandelaka v. Snyder*, No. C.A. 96-457, 1998 WL 299360, at *6 n.3 (D. Del. May 22, 1998). The Sixth Circuit does not appear to have had occasion to address the issue.

The Court respectfully disagrees with those decisions that hold that statements similar to Respondent's constitute an "express waiver." The Court finds that the Warden's statement "the issue is properly before this Court" is an incorrect concession that Petitioner has exhausted his state-court remedies.[3] A waiver, on the other hand, is an "intentional or voluntary relinquishment of a known right." Black's Law Dictionary, 6th ed. 1990. If the government had known that it had a right to raise procedural default and wished to waive it knowingly and voluntarily,

[3] In this case, of course, failure to exhaust is tantamount to a procedural default since state remedies are no longer available to Petitioner.

it would not have made a statement equivalent to saying it had no such right at all. Furthermore, the Court cannot infer waiver from the Warden's conduct because the statute requires the waiver to be "express."

Therefore, the Court concludes that the state has not waived its procedural default defense. The Court raises the defense sua sponte for the same reasons as stated when it raised the issue on Petitioner's claim for ineffective assistance of counsel in failing to object to the jury instruction on the burden of proof. The Court concludes that Petitioner has defaulted the claim. Finally, the default is not excused for the same reasons it was not excused on the seven other defaulted issues.[4]

4.

In his fourth claim for relief, Petitioner contends that the trial court's jury instruction on reasonable doubt unconstitutionally lowered the prosecution's burden of proof. The Warden moves for summary judgment on the ground that the instruction was not unconstitutional but also notes that the Tennessee Court of Criminal Appeals considered this claim to have been waived. Petitioner does not address the procedural default issue. The Magistrate Judge concluded that the jury instruction was not unconstitutional and recommended that the motion be granted. The Court agrees that the motion should be granted but

[4] The Tennessee Office of the Attorney General is advised that a federal court is not required to raise the issue of procedural default sua sponte. *See Trest v. Cain*, 522 U.S. 87 (1997). Therefore, if the government fails to raise the issue in this Court in the future, it does so at its own risk.

does not reach the merits. Instead, the Court concludes that Petitioner has procedurally defaulted this claim.

This issue appears to have been raised for the first time before the Tennessee Court of Appeals during the post-conviction proceedings. (Docket Entry No. 15, Addendum 1 at iv, 5-8; Docket Entry No. 15, Addendum 5 at 3). The Court has been unable to find any reference to it in the trial record, which is over 800 pages long, and no mention of it was made when the trial court was considering other jury instructions (Tr. 680-87). It was not raised to the Tennessee Court of Appeals on direct review. (Docket Entry No. 7, Addendum 1 at 2); *see also* 839 S.W.2d at 360. Petitioner did not include it in his Application for Permission to Appeal to the Tennessee Supreme Court. (Docket Entry No. 7, Addendum 2 at 2, 4). Finally, it was not considered by the trial court during post-conviction proceedings. (Docket Entry No. 15, Addendum 5 at 10). When the post-conviction proceedings reached the Tennessee Court of Appeals, it addressed the merits but only as an alternative holding.

> [T]he Petitioner contends that the instruction submitted to the jury regarding reasonable doubt was constitutionally insufficient and a violation of due process. At the outset, we note that the Petitioner did not address this issue until this appeal. Although he briefly alluded to the issue during his testimony at the post-conviction hearing, neither the original pro se petition nor the amended petition contained this issue. Furthermore, the trial court did not address the issue in its order nor has the Petitioner alleged any reason why a waiver would not apply. See Tenn. Code Ann. § 40-30-206(g). However, *even if we*

> *were to address the issue, we would conclude* that it had no merit.

Adams v. State, No. 01C01-9609-CR-00401, 1997 WL 803585, at *6, (Tenn. Crim. App. Dec. 30, 1997) (emphasis added). When a state court's primary holding is a state procedural bar, the existence of an alternative holding does not vitiate the bar. *See Coe v. Bell*, 161 F.3d 320, 330 (6th Cir. 1998) (citing *Harris v. Reed*, 489 U.S. 255 (1989)). As such, the claim is defaulted.

Petitioner has not suggested any reason why this procedural default should be excused, so the Court finds that there is none.

5.

In his fifth claim for relief, Petitioner contends that his counsel during the state's post-conviction proceedings was constitutionally ineffective. The Court agrees with the Warden and the Magistrate Judge that *Coleman*, 501 U.S. at 752 (citing cases), forecloses this claim. Furthermore, 28 U.S.C. § 2254(i) states, "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." Therefore, with respect to this issue, the Court adopts the Magistrate Judge's R&R.

6.

In his sixth claim for relief, Petitioner contends that the trial court admitted various statements into evidence in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Warden moves to dismiss on the ground that Petitioner has

procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused. (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 12). Upon a finding of cause and prejudice, the Magistrate Judge excused the procedural default, proceeded to the merits, concluded that there had been no *Miranda* violation, and recommended that the Warden's motion be granted. The Court agrees that the motion should be granted but does not reach the merits. Instead, the Court finds that Petitioner has not established a basis to excuse the procedural default.

Petitioner posits the constitutional ineffectiveness of counsel on direct appeal before the Tennessee Supreme Court as "cause" to excuse the procedural default of his *Miranda* claim. However, Petitioner acknowledges that that "cause" is itself procedurally defaulted -- just as it was when Petitioner presented ineffective assistance of appellate counsel as a claim instead of as "cause" to excuse the procedural default of another claim. Therefore, he is required to establish a basis to excuse the procedural default of the ineffective assistance of appellate counsel "cause" that (along with a showing of prejudice) would excuse the procedural default of his *Miranda* claim. *See Edwards*, 120 S. Ct. 1587 (a defaulted ineffective assistance of counsel claim can serve as "cause" to excuse the procedural default of another habeas claim if the petitioner can establish "cause and prejudice" for the default of the ineffective assistance claim). Again paralleling his claim for ineffective assistance of appellate counsel, Petitioner asserts the ineffective assistance of post-conviction counsel for that purpose. The Court rejects this argument for the same reasons that it did when it considered ineffective assistance of appellate counsel as a claim:

Coleman precludes it, and there is no constitutional right to counsel on a second appeal anyway.

7.

In his seventh claim for relief, Petitioner contends that the admission of his co-conspirator's hearsay statements at trial violated his constitutional right to confront his accusers. The Warden moves to dismiss on the ground that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused. (Reply Gov't's Am. Mot. Dismiss and Summ. J at 16). Upon a finding of cause and prejudice, the Magistrate Judge excused the procedural default, proceeded to the merits, agreed that Petitioner's Confrontation Clause rights had been violated, and indicated that the writ should be granted unless it was determined at a hearing that the error was harmless. The Court respectfully disagrees. Without reaching the merits, the Court concludes that Petitioner has not established a basis to excuse the procedural default.

Petitioner's basis to excuse the procedural default of his Confrontation Clause claim is the same one that he asserted to excuse the procedural default of his *Miranda* claim. He attempts to make a showing of "cause and prejudice" by proffering the ineffective assistance of counsel on direct appeal before the Tennessee Supreme Court as the "cause." However, the ineffective assistance of appellate counsel "cause" is itself procedurally defaulted, so Petitioner asserts the ineffective assistance of post-conviction counsel as "cause" to excuse that default. The Court rejects the argument for the same reasons as before:

Coleman precludes it, and there is no constitutional right to counsel on a second appeal anyway.

8.

In his eighth claim for relief, Petitioner contends in his Application for a Writ of Habeas Corpus and in the proceedings before the Magistrate Judge that the trial court had improperly ordered his sentences to run consecutively. The Warden moves to dismiss on the ground that the claim is procedurally defaulted. Upon a finding of cause and prejudice, the Magistrate Judge recommended that the procedural default be excused but concluded that whether sentences should run consecutively or concurrently is a matter of Tennessee law. Consequently, the Magistrate Judge found that the trial judge's decision rested upon an adequate and independent substantive state ground, which precludes federal habeas relief, *see, e.g.*, *Wainwright v. Sykes,* 433 U.S. 72, 81 (1977). In Petitioner's objections to the Report and Recommendation and Response to the Respondent's Objections (Docket Entry No. 32), Petitioner now acquiesces to the Magistrate Judge's reasoning and withdraws the claim. The state has never addressed the question of the existence of an adequate and independent state ground. Considering that Petitioner has withdrawn his claim that the trial judge improperly ordered his sentences to run consecutively, coupled with the state's silence, the Court considers the issue moot, and there is no need to consider it further.

9.

In his ninth claim for relief, Petitioner contends that this Court should grant a writ of habeas corpus because he

is "actually innocent" of the crimes charged. The Warden moves to dismiss on the ground that "actual innocense [sic]" is not a cognizable ground for habeas relief, *see Herrera v. Collins*, 506 U.S. 390 (1993), and that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused for cause and prejudice (Pet'r's Objs. R&R and Resp. Resp't's Objs. at 14) and to prevent a "fundamental miscarriage of justice" (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 18). Although the Magistrate Judge did not address the Warden's contention that "actual innocense [sic]" is not a basis for habeas relief, the Magistrate Judge agreed with the Warden that the procedural default should not be excused. As an alternative holding, the Magistrate Judge recommended that the motion be granted because Petitioner has not made a showing of actual innocense [sic]. The Court agrees that the motion should be granted but does not reach the issue of procedural default or the merits. Instead, the Court agrees with the Warden that this claim is foreclosed by the Supreme Court's holding in *Herrera* that a freestanding claim of "actual innocense [sic]" may not serve as a basis for habeas relief. *Herrera* is directly on point, and no further discussion is warranted. *See also Sims v. United States,* No. 98-1228, 1999 WL 1000855, *2 (6th Cir. 1999).[5]

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[5] In considering whether Petitioner's procedural default on other issues should be excused, the Court has taken into account Petitioner's argument regarding "actual innocence" to determine whether he can establish "prejudice" or a "fundamental miscarriage of justice." In that context, Petitioner's contention that he is "actually innocent" is entirely appropriate. However, Petitioner has also styled "actual innocence" as a

(Continued on following page)

10.

In his tenth claim for relief, Petitioner contends that the evidence was insufficient to convict him as a matter of law. The Warden moves to dismiss on the ground that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused to prevent a "fundamental miscarriage of justice." (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 16). The Magistrate Judge recommended that the Motion to Dismiss be granted both because Petitioner has not established a basis to excuse the procedural default and, in the alternative, because the evidence was sufficient to convict. The Court agrees with the Magistrate Judge but wishes to make its rationale clear.

Petitioner has an exceptionally high burden in establishing that his procedural default should be excused to prevent a "fundamental miscarriage of justice." Specifically, he must show that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). In other words, he "must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory

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freestanding claim, which *Herrera* precludes. The Supreme Court explained the distinction in *Schlup v. Delo*, 513 U.S. 298, 313-17 (1995).

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324. The standard is met only in an "extraordinary case." *Id.* at 323 (citing *Carrier*, 477 U.S. at 496).

Petitioner has requested an evidentiary hearing to meet this standard, but he has not in any way stated what facts he intends to prove at such a hearing – much less presented to the Court any evidence that would create a genuine issue of material fact. Instead, without a scintilla of new evidence to support it, he simply makes the conclusory allegation that "the proof would show that Mr. Adams had no knowledge of his co-defendant's intent to rob the convenience store and Thomas Weser, nor did Mr. Adams take part in either incident." (Pet'r's Objs. R&R and Resp. Resp't's Objs. at 15). The Court is simply not permitted to conduct an evidentiary hearing under these circumstances. *See* 28 U.S.C. § 2253(e)(2).

However, in an abundance of caution, the Court has reviewed the entire trial record. Just as the Magistrate Judge found, the Court concludes that nothing in the record comes close to suggesting that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327.

It is worth noting, as did the Magistrate Judge, that even if Petitioner could demonstrate that his procedural default should be excused to prevent a "fundamental miscarriage of justice," he would still lose on the merits. As substantial as the burden of proof is in establishing a claim of "fundamental miscarriage of justice," it is even more formidable when Petitioner seeks to establish that the evidence was insufficient to convict. *See Jackson v.*

Virginia, 443 U.S. 307 (a court can grant a petition for habeas corpus on the basis of insufficient evidence only if no rational juror could have voted to convict).

IV.

Based on the foregoing reasons, the Court rules on Petitioner's ten claim as follows.

1.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of ineffective assistance of counsel at trial, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

2.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel on direct appeal, the Report is hereby ADOPTED IN PART and REJECTED IN PART, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

3.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of improper consolidation of indictments, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

4.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim that the trial court's jury instruction on reasonable doubt unconstitutionally lowered the prosecution's burden of proof, the Report

is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

5.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel during post-conviction proceedings, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

6.) Regarding Respondent's Motion to Dismiss Petitioner's claim of a *Miranda* violation, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

7.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the admission of his co-conspirator's hearsay statements at trial violated his constitutional right to confront his accusers, the Report is hereby REJECTED, and the Recommendation that the motion be denied is also hereby REJECTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

8.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the trial court improperly ordered Petitioner's sentences to run consecutively, both the Report and Recommendation that the motion be granted are hereby REJECTED AS MOOT because Petitioner has withdrawn the claim. Accordingly, the

Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

9.) Regarding Respondent's Motion to Dismiss Petitioner's claim of actual innocense [sic], the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

10.) Regarding Respondent's Motion to Dismiss Petitioner's claim of insufficient evidence, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

Accordingly, Respondents Motion to Dismiss and for Summary Judgment is GRANTED as to all claims, Petitioner's Application for a Writ of Habeas Corpus is DENIED, and this case is hereby DISMISSED. Since Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), a certificate of appealability shall not issue.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2003 FED App. 0100P (6th Cir.)
File Name: 03a0100p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, *Petitioner-Appellant,* v. FLORA J. HOLLAND, Warden, *Respondent-Appellee.*	No. 00-6575

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 99-00519 – Robert L. Echols, Chief District Judge.

Argued: September 11, 2002

Decided and Filed: April 4, 2003

Before: BOGGS and COLE, Circuit Judges; BATTANI, District Judge.*

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL,

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* The Honorable Marianne O. Battani, United States District Judge for the Eastern District of Michigan, sitting by designation.

CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Mariah A. Wooten, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

OPINION

BATTANI, District Judge. Before the court is Petitioner-Appellant Frank Adams's appeal from the denial of his habeas petition by the Middle District of Tennessee, Honorable District Court Judge Robert L. Echols. Appellant now preserves for appeal his claim for habeas relief based on the state trial court's admission of his co-defendant Timothy Crowell's hearsay testimony at trial, arguing that the admission of that statement violated Appellant's rights under the Confrontation Clause of the U.S. Constitution. Appellee argues that Appellant has procedurally defaulted his habeas challenge on this issue by failing to argue it in front of the Tennessee Supreme Court, and alternatively, that the admission of the co-defendant's statements did not violate Appellant's constitutional rights. Appellant now appeals the District Court's ruling that his habeas claim has been procedurally defaulted. We **AFFIRM**.

I. Factual Background

In February 1991, a jury in Davidson County, Tennessee, found Appellant guilty of the felony-murder of Thomas Weser and two counts of aggravated robbery, for which

Appellant was sentenced to life in prison plus twenty years. In October 1992, the Tennessee Court of Criminal Appeals affirmed those convictions. Appellant then applied for permission to appeal to the Tennessee Supreme Court, but did not specifically mention the Confrontation Clause issue before this court in that application, which was denied in June 1998.

In June 1999, Appellant filed his habeas petition before the District Court. The Magistrate Judge recommended that all of Appellant's habeas claims be dismissed except for his Confrontation Clause claim. The District Court agreed with the Magistrate Judge on all of the issues except for the Confrontation Clause issue; on the latter claim, the District Court found that Appellant had procedurally defaulted the claim by failing to bring it before the Tennessee Supreme Court in his application for permission to appeal. Appellant asked for a Certificate of Appealability from both the District Court and this court, and was denied both requests. He then filed a petition for Rehearing with this court on June 21, 2001. While this petition was pending, the Tennessee Supreme Court promulgated Tennessee Supreme Court Rule 39, which Appellant argues removes the procedural default assessed against his Confrontation Clause claim. Accordingly, on August 16, 2001, this court vacated the denial of Appellant's certificate of appealability, and granted a certificate on the following two issues: 1) whether, in light of Tennessee Supreme Court Rule 39, Appellant's Confrontation Clause claim is procedurally defaulted; and 2) if not, whether the admission of the co-defendant's statements violated Appellant's rights under the Confrontation Clause.

II. Discussion

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *E.g., Miller v. Francis,* 269 F.3d 609, 613 (6th Cir. 2001).

A. Procedural Default

Appellant acknowledges that, were it not for Rule 39, his claim would be procedurally defaulted because review by a state supreme court is normally an "available state remedy" that must be exhausted before a federal habeas petition can be filed, even if the state supreme court has only discretionary appeals. *O'Sullivan v. Boerckel,* 526 U.S. 838, 847-48 (1999). Appellant concedes that he did not bring his Confrontation Clause issue before the Tennessee Supreme Court. Appellant argues, however, that in passing Rule 39, the Tennessee Supreme Court changed the landscape of exhaustion law in Tennessee. The rule reads in relevant part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

Tenn. Sup. Ct. R. 39. Specifically, Appellant argues that Rule 39 removes review by the Tennessee Supreme Court as an "available state remedy" for any habeas claim after July 1, 1967, and that his Confrontation Clause issue has therefore not been procedurally defaulted by his failure to bring it before the Tennessee Supreme Court.

Appellee does not contest that Rule 39 purports to remove Tennessee Supreme Court review as an available state remedy for habeas purposes. Instead, Appellee argues that Rule 39 violates the Supremacy Clause of the U.S. Constitution because it conflicts with federal law as established in *O'Sullivan*. Appellee contends that, because discretionary review is still technically available in the Tennessee Supreme Court, *O'Sullivan* controls, and Rule 39 cannot displace federal law on the question of what counts as available state remedies. Appellee's alternative argument is that, even if Rule 39 did remove Tennessee Supreme Court review as an available state remedy, it did not do so "retroactively" and therefore Appellant's habeas claim is still procedurally defaulted. Specifically, Rule 39 was promulgated after Appellant's habeas petition had been submitted, and was promulgated even after Appellant had applied for a rehearing on the denial of his certificate of appealability. Appellee maintains that Rule 39, at most, removed Tennessee Supreme Court review for habeas petitions brought after its promulgation, and that Appellant's habeas claim therefore remains procedurally defaulted.

1. Rule 39 has made Tennessee Supreme Court review "unavailable"

The Supreme Court has recently held that even discretionary appeals by a state supreme court are

available state remedies that must be exhausted for habeas relief. *O'Sullivan,* 526 U.S. at 847-48. The *O'Sullivan* Court, however, explicitly excepted from its holding cases in which the state has explicitly disavowed state supreme court review as an "available state remedy." *Id.* at 847. In this regard, the Supreme Court stated that "we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." *Id.* The Supreme Court recognized that federal law does not prohibit a state from deciding for itself the availability of a particular state remedy. "The exhaustion doctrine, in other words, turns on an inquiry into what procedures are 'available' under state law . . . there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48. Rule 39 clearly removed Tennessee Supreme Court review as an antecedent for habeas purposes. By its terms, Rule 39 dictates that once the Court of Criminal Appeals has denied a claim of error, "the litigant shall be deemed to have exhausted all available state remedies available for that claim." Tenn. Sup. Ct. R. 39.

Appellee argues that Rule 39 has not technically made Tennessee Supreme Court review *unavailable,* however, since litigants have not been explicitly prohibited from appealing to the state supreme court. According to Appellee, Rule 39 would only have made Tennessee Supreme Court review "unavailable" if it had used explicit statements such as "a litigant shall hereby not be allowed to petition this Court for review," or "this Court will no longer, under any circumstances, review decisions of the Court of Criminal Appeals rejecting claims of error." Appellee's argument, however, fails to grasp the meaning

of the word "available" as it is used in *O'Sullivan,* and instead dwells upon a hypertechnical interpretation of that term. Appellee's misinterpretation is revealed by the *O'Sullivan* Court's examples of what might constitute making state supreme court review unavailable: namely, rules passed by the Supreme Courts of South Carolina and Arizona. *O'Sullivan,* 526 U.S. at 847. Although the *O'Sullivan* majority declined to rule definitively on whether those rules would change the law on exhaustion and procedural default, it did recognize that the rules were trying to make state supreme court review unavailable in those states for habeas purposes. *Id.* The South Carolina Supreme Court, for example, declared:

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of certiorari upon the Court of Appeals' denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, *a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.*

In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564 (1990) (emphasis added) (footnote omitted). The *O'Sullivan* Court considered this South Carolina rule as trying to remove South Carolina Supreme Court review as an available state

remedy for habeas purposes, but reserved judgment as to whether the rule actually succeeded in doing so. *O'Sullivan,* 526 U.S. at 847-48.

It is worth noting that the highlighted language is essentially identical to that in Rule 39. Specifically, neither rule completely removes state supreme court review as an option for litigants; indeed, the South Carolina rule explicitly allows for the presentation of the claim to its Supreme Court. Both rules, however, establish that Supreme Court review is no longer part of the normal course of review for criminal appeals, and is not necessary for exhaustion of "all available state remedies." *See also State v. Sandon,* 161 Ariz. 157, 158 (1989) ("Once the defendant has been given the appeal to which he has a right [i.e., in the Court of Appeals], state remedies have been exhausted") (internal quotations omitted). The *O'Sullivan* Court pointed out that, contrary to Appellee's assertions, technically available remedies are still not "available" for habeas purposes when "those remedies are alternatives to the standard review process." *O'Sullivan,* 526 U.S. at 844 (citing *Wilwording v. Swenson,* 404 U.S. 249, 249-50 (1971)). Instead, when remedies are taken outside of the normal criminal review process, those remedies become "extraordinary:" technically available to the litigant but not required to be exhausted. *Id.*

Our view of the *O'Sullivan* opinion is bolstered by the concurring opinion of Justice Souter from that case. First, Justice Souter, who joined the majority, also cited the South Carolina rule as an example of a state making its Supreme Court review an "unavailable" state remedy, and echoed the majority opinion's citation of *Wilwording. O'Sullivan,* 526 U.S. at 849-50. Justice Souter made two further crucial observations about the majority opinion.

First, Justice Souter explained that under the majority opinion, a state supreme court did not have to "be subjected to constant applications for a form of discretionary review that the State wishes to reserve for truly extraordinary cases, or else be forced to eliminate that kind of discretionary review." *Id.* at 850. In other words, again contrary to Appellee's argument, a state supreme court can preserve discretionary review of criminal appeals while still dictating that review to be "unavailable" for habeas purposes. Second, Justice Souter stated his understanding "that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.*

Thus, the majority and concurring opinions from *O'Sullivan* lead us to believe that Rule 39 rendered Tennessee Supreme Court review "unavailable" in the context of habeas relief. Moreover, the language quoted above from *O'Sullivan* also indicates that this decision by the Tennessee Supreme Court does not violate the Supremacy Clause. A state law or rule violates the Supremacy Clause only if it explicitly conflicts with federal law. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663 (1993); *accord Southeastern Oakland County Res. Recovery Auth. v. City of Madison Heights,* 5 F.3d 166, 168 (6th Cir. 1993). As quoted above, the Supreme Court has not yet explicitly decided whether a rule like Rule 39 would remove state supreme court review for habeas purposes. *O'Sullivan,* 526 U.S. at 847-49. This statement alone shows that there is no "actual conflict" between Rule 39 and federal law. Even beyond this, however, the language quoted above from

O'Sullivan clearly shows the Supreme Court's view that the question of what constitutes the body of "available state remedies" is one of state law, not one of federal law: "there is *nothing* in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available . . . " *Id.* (emphasis added).

Finally, it should be pointed out that *every* other lower court that has considered, post-*O'Sullivan,* the effect of a rule like Rule 39 has held that such a rule permissibly eliminates state supreme court review as an available state remedy that must be exhausted. The Ninth Circuit found that *O'Sullivan* implicitly overruled its earlier position that Arizona could not remove state supreme court review as an available state remedy to be exhausted. *Swoopes v. Sublett,* 196 F.3d 1008, 1009-11 (9th Cir. 1999). Similarly, the Eighth Circuit held that a Missouri rule clearly stated its intent to place state supreme court review outside the set of available state remedies preceding habeas relief. *Randolph v. Kemna,* 276 F.3d 401, 404 (8th Cir. 2002); *see also Mattis v. Vaughn,* 128 F.Supp.2d 249, 256-61 (E.D. Pa. 2001). Appellee's attempt to rely on *Rodriguez v. Scillia,* 193 F.3d 913, 917 (7th Cir. 1999), is unsuccessful because Illinois has a discretionary appeal system *without* a rule like the one passed in Arizona, Pennsylvania, Missouri or Tennessee, and so *O'Sullivan* still applies there.

2. Rule 39 does not operate retroactively to prevent procedural default by Appellant in this case

A closer question is presented as to whether Rule 39 applies "retroactively" to Appellant's case in particular. Two Circuit Courts have considered whether a rule like

Rule 39 can apply to habeas petitions filed before their promulgation, and have come to opposite conclusions. Dealing with the Missouri rule, the Eighth Circuit rejected the State's argument that "because the amendment to Rule 83.04 has an effective date of July 1, 2002, its invocation" did not help the petitioner, who filed for habeas relief before that date. *Randolph,* 276 F.3d at 404. The Eighth Circuit based its conclusion on the Rule's language, which indicated that it was not changing Missouri law to exclude state supreme court review as an available remedy, but rather was clarifying what had already been Missouri law. *Id.* "The order recites that 'In order to state the existing law in Missouri, the Court notes that transfer of a case . . . to this Court . . . is not part of the standard review process for the purposes of federal habeas corpus review.'" *Id.* The *Randolph* court reasoned that because the announcement of the Missouri rule purported to clarify the existing law, rather than change it, the rule had applied when the petitioner had filed for habeas relief, and so was not even being applied retroactively in that case. *Id.*

On the other hand, the Third Circuit refused to apply the Pennsylvania rule, passed in May 2000, to remove the procedural default from a habeas petition filed before that date. *Wenger v. Frank,* 266 F.3d 218, 225-226 (3rd Cir. 2001). The Third Circuit based its conclusion largely on textual considerations. First, it looked to the language of the Pennsylvania rule, which announced, "AND NOW, this 9th day of May, 2000 . . . we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal . . . in order to be deemed to have exhausted all available state remedies . . . This Order shall be effective immediately." *Id.* at 224-25

(internal quotations omitted). The Third Circuit found that language to allow application of the rule only on or after May 9, 2000, because it announced that it would be "effective immediately," not as of some prior date. *Id.* at 225. Based on that same language, the *Wenger* court also found that the Pennsylvania rule had amended Pennsylvania law, and that prior to its passage, state supreme court review had been an available state remedy in Pennsylvania. *Id.* at 226. This, of course, stands in contrast to the language of the Missouri rule, which established that it was clarifying existing law rather than creating different law on the subject.

Superficially, the instant case seems more similar to the one in *Randolph* than in *Wenger* because Rule 39 announced its applicability to "all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." Tenn. Sup. Ct. R. 39. However, Rule 39 does not state clearly that it is merely elucidating existing Tennessee law, unlike the Missouri rule, which stated explicitly that it only clarified Missouri law. Indeed, federal courts interpreting Tennessee law have, until the passage of Rule 39, always required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement, revealing that Rule 39 *changed* Tennessee law rather than merely clarifying it. *E.g., Stubbs v. Bomar,* 321 F.2d 535, 536 (6th Cir. 1963); *Jones v. Jones,* 76 F.Supp.2d 850, 856-57 (E.D. Tenn. 1999); *Abdur'Rahman v. Bell,* 999 F.Supp. 1073, 1080 (M.D. Tenn. 1998), *vacated on other grounds by* 226 F.3d 696 (6th Cir. 2000); *Cole v. Campbell,* 703 F.Supp. 657, 659 (M.D. Tenn. 1988); *Layman v. Russell,* 300 F.Supp. 430, 431 (E.D. Tenn. 1969). In other words, prior to Rule 39, the law of Tennessee was apparently that Tennessee Supreme Court review was an

available remedy, so unlike the Missouri rule, Rule 39 should not be applied retroactively.

The Third Circuit invoked policy considerations to bolster its textual conclusion, surmising that allowing retroactive application of the Pennsylvania rule would not serve the rule's purpose of easing the burden on the state supreme court's docket because the state supreme court had already passed on those petitions filed before the rule. *Id.* at 225-26 (citing *Mattis,* 128 F.Supp.2d at 262). Thus, the rule would merely serve to burden the federal courts with erstwhile dormant habeas cases, without providing any corresponding benefit to the state court system. *Mattis,* 128 F.Supp.2d at 262. The *Wenger*/*Mattis* policy arguments against retroactive application are as persuasive to this court as the textual arguments. Rules like Rule 39 allow state supreme courts to lessen their workload by largely avoiding the onslaught of criminal appeals. Applying Rule 39 *retroactively,* however, does not help to lessen any burden on the Tennessee Supreme Court because the cases that would be reached by retroactive application are not threats to burden the Tennessee Supreme Court's docket. For example, Appellant's case here cannot be placed back in front of the Tennessee Supreme Court, so application of Rule 39 to his case would not result in any efficiency gain such as that envisioned by the *O'Sullivan* Court. Instead, retroactive application simply threatens to burden federal courts with long-dormant habeas cases, with no corresponding benefit to the state court systems. *Wenger,* 266 F.3d at 225-26; *Mattis,* 128 F.Supp.2d at 262. In short, this court does not apply Rule 39 retroactively to Appellant's case, and therefore finds that his Confrontation Clause claim is procedurally defaulted.

B. The Confrontation Clause claim

Also before the court are Appellant's Confrontation Clause claim and his request that the court add the transcript of the closing arguments to the appellate record when considering that claim. Because we hold that Appellant's Confrontation Clause issue is procedurally defaulted, we do not reach these other two issues.

III. Conclusion

For the reasons stated above, we AFFIRM the judgment of the District Court denying Appellant's habeas petition.

No. 00-6575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, Petitioner-Appellant, v. FLORA J. HOLLAND, Warden, Respondent-Appellee.	)	ORDER (Filed Jun. 7, 2001)

Before: MARTIN, Chief Judge.

Frank E. Adams, a Tennessee prisoner, appeals a district court order dismissing his petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. He has applied for a certificate of appealability. *See* Fed. R. App. P. 22(b)(1).

The application for a certificate of appealability is denied because Adams has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253 (c)(2).

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

No. 00-6575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, Petitioner-Appellant, v. FLORA J. HOLLAND, Warden, Respondent-Appellee.	)	ORDER (Filed Aug. 16, 2001)

Before: NORRIS, MOORE, and COLE, Circuit Judges.

Petitioner-Appellant Frank E. Adams has filed a petition for rehearing of this court's order of June 7, 2001, which denied Adams a certificate of appealability to appeal the district court's dismissal of his habeas corpus petition. *See* 28 U.S.C. § 2254.

Upon careful consideration, this panel grants the petition for rehearing and vacates the court's prior order. The panel grants Adams a certificate of appealability on the following issues: (1) whether, in light of Tennessee Supreme Court Rule 39, as amended June 28, 2001, Adams procedurally defaulted claim (7); and (2) if not, whether the trial court's admission of the statement by Adams' co-defendant violated his Fifth Amendment right of confrontation. Adams's application for a certificate of appealability is denied as to all other claims.

The clerk is directed to establish a briefing schedule.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

No. 00-6575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, Petitioner-Appellant, v. FLORA J. HOLLAND, WARDEN, Respondent-Appellee.	)	ORDER (Filed Aug. 27, 2003)

BEFORE: BOGGS and COLE, Circuit Judges; and BATTANI, * District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Marianne O. Battani, United States District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES CODE

TITLE 28

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . .

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

. . .

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: ORDER ESTABLISHING RULE 39, RULES OF THE SUPREME COURT OF TENNESSEE: EXHAUSTION OF REMEDIES

(Filed June 28, 2001)

ORDER

In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting

a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

FOR THE COURT:

/s/ Riley Anderson
Riley Anderson, Chief Justice

(2)

Supreme Court, U.S.
FILED

No. 03-02 821 NOV 18 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

FLORA HOLLAND, WARDEN,

Petitioner,

v.

FRANK E. ADAMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

FRANK E. ADAMS Petitioner, v. FLORA HOLLAND, Warden Respondent.	)))))))	No. 3:99-0519

TO: The Honorable Robert L. Echols, Chief District Judge

REPORT AND RECOMMENDATION

(Filed June 30, 2000)

I. INTRODUCTION

This petition for writ of habeas corpus was filed under 28 U.S.C. § 2254 on June 14, 1999 (Docket Entry No. 1). Inmate Frank E. Adams ("Petitioner") alleges that he is being illegally detained by Flora Holland ("Respondent"), Warden of the Louis Deberry Special Needs Facility, Tennessee Department of Corrections. He alleges ten (10) grounds for relief.

For the following reasons, the Magistrate Judge recommends that Respondent's Motion to Dismiss be **GRANTED** as to issues 1b, 4, 5, 6, 9, and 10, and **DENIED** as to issue 7 (the Confrontation Clause claim), and that Respondent's Motion for Summary Judgment be **GRANTED** as to issues 1a, 2, and 3.

II. BACKGROUND

A. Factual Background

The facts of this case, as summarized by the Tennessee Court of Criminal Appeals ("TCCA") are as follows:

> The record establishes that on February 5, 1989, at about 2:30 a.m., the defendant and Timothy Allen Crowell robbed a convenience market clerk with a deadly weapon. One of the two remained outside as "look-out" and "getaway car" driver, but we are unable to determine from the record the precise role each played. At about 3:50 a.m. the same morning, the defendant and Crowell robbed and killed Thomas Weser, an exchange student at a local university.[1]

State v. Adams, 859 S.W.2d 359, 361 (Tenn. Crim. App. 1992), *perm. app. denied* (Tenn. 1993). More detailed facts will be provided where relevant.

B. Procedural History

Due to the procedural complexities of the proceeding before this Court, Petitioner's appellate efforts are summarized below:

---

[1] In his petition, Petitioner avers that Mr. Crowell robbed the convenience store and shot the exchange student. Petitioner claims to have had no knowledge of Mr. Crowell's intentions as he thought Mr. Crowell was entering the store to purchase beer and cigarettes and stopping to use the bathroom. The two men had gone out that evening "only to party, only to drink beer and smoke a little, a couple of joints." (Docket Entry No. 23 at 1-2).

A jury found [Petitioner] guilty of felony-murder and two counts of aggravated robbery on February 14, 1991. He was sentenced to life imprisonment for the count of felony murder and ten years for each count of aggravated robbery, all to be served consecutively for an effective sentence of life plus twenty years.

[Petitioner's] motion for a new trial was denied. In his direct appeal, [Petitioner] raised four issues: the admission of his pretrial statements, the consolidation of the indictments for trial, the admission of a co-defendant's statement into evidence, and the ordering of consecutive sentences. The Court of Criminal Appeals of Tennessee affirmed his convictions on October 29, 1992. To the Tennessee Supreme Court, [Petitioner] raised only one issue – the consolidation of the indictments for trial. In its denial of his application to appeal on June 28, 1993, the Court stated that it had considered "the application for permission to appeal and the entire record in this cause," implying that all claims had been considered.

[Petitioner] filed a pro se petition for post-conviction relief on October 21, 1993. On May 31, 1995, with the assistance of counsel, [Petitioner] filed an amended petition. The post-conviction petitions before the trial court alleged ineffective assistance of trial counsel. The trial court conducted an evidentiary hearing on the petition on July 5, 1995, and denied post-conviction relief on July 17, 1995. [Petitioner] filed a notice of appeal on May 13, 1996; this notice was not timely filed, however the Court of Criminal Appeals waived the requirement of timely notice and accepted the petition "in the interest of justice."

> In his post-conviction petition to the Tennessee Court of Criminal Appeals, [Petitioner] raised two issues – the ineffective assistance of trial counsel and an invalid jury instruction on reasonable doubt. The Court of Criminal appeals affirmed the trial court's denial of the petition on December 30, 1997, addressing the merits on both issues.
>
> [Petitioner] appealed both issues to the Tennessee Supreme Court in a pro se petition, in which he included an additional claim regarding the ineffective assistance of post-conviction counsel. The Tennessee Supreme Court denied his application for permission to appeal on June 8, 1998.

(Docket Entry No. 23 at 2-4).

On June 24, 1999, the Honorable Robert L. Echols, Chief District Judge, found that the instant complaint was not facially frivolous and directed Respondent to answer (Docket Entry No. 3). On July 16, 1999, the Tennessee Attorney General, on behalf of Respondent, moved to dismiss and for summary judgment (Docket Entry No. 4) on the grounds set forth in its memorandum in support of such motion, also filed on July 16, 1999 (Docket Entry No. 5). Thereafter, then-Magistrate Judge Haynes appointed the Federal Public Defender to represent Petitioner in this action (Docket Entry No. 12, entered August 26, 1999).

On December 8, 1999, this case was reassigned to the undersigned Magistrate Judge after Judge Haynes' appointment to the District Court (Docket Entry No. 22).

Petitioner filed an amended Petition for Writ of Habeas Corpus on December 27, 1999 (Docket Entry No. 23). Respondent then submitted an Amended Motion to

Dismiss and for Summary Judgment with a supplemental Memorandum of Law on January 21, 2000 (Docket Entry Nos. 27 and 28). Petitioner's reply brief was filed on February 11, 2000 (Docket Entry No. 29).

The petitioner alleges the following grounds for relief:

1a. Petitioner was denied effective assistance of counsel at trial;

1b. Petitioner was denied effective assistance of counsel on direct appeal;

2. The trial court erred when it improperly ordered the consolidation of the indictments for trial in violation of the Fifth and Fourteenth Amendments, and this error was not harmless;

3. The trial court's reasonable doubt instruction unconstitutionally misstated the prosecution's burden of proof;

4. Petitioner was denied effective assistance of post-conviction counsel;

5. The trial court erred when it improperly denied Petitioner's Motion to Suppress his statements obtained in violation of his Fifth Amendment right to Miranda Warnings and Sixth Amendment right to counsel;

6. The trial court erred and violated Petitioner's Fifth Amendment right to due process when it found that Petitioner was a dangerous offender and gave him consecutive sentences for the two counts of aggravated robbery;

7. Petitioner's Confrontation Clause rights and his right to due process were violated by the admission of a statement of his co-defendant,

and this constitutional violation was not harmless;

8. (Omitted – No allegation);

9. Petitioner is actually innocent of the crimes for which he has been convicted;

10. The trial court erred and violated Petitioner's Fifth Amendment right to due process when it refused to enter a judgment of acquittal although the evidence against petitioner was insufficient as a matter of law.

(Docket Entry 23).

III. ANALYSIS

"State prisoners . . . may file a 28 U.S.C. § 2254 petition for writ of habeas corpus to challenge the constitutionality of their state court convictions, after exhausting all available state court remedies." *Clemmons v. Sowders*, 34 F.3d 352, 354 (6th Cir. 1994); *see* 28 U.S.C. § 2254(b). This exhaustion requirement springs from considerations of comity between the states and federal government and is designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners' rights. *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). To satisfy the exhaustion requirement, the petitioner must present every claim raised in the federal petition to each level of the state courts. *Picard v. Connor*, 404 U.S. 270, 276, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); *Doctor v. Walters*, 96 F.3d 675, 678 (3rd Cir. 1996). Section 2254(c) provides that a habeas petitioner "shall not be deemed to have exhausted [state court] remedies . . . if he has the right under [state] law . . . to raise, by any available procedure, the question presented." *See Dennis v.*

Mitchell, 68 F. Supp. 2d 863, 878-79 (N.D. Ohio 1999). Once the petitioner's claims have been raised in the state's highest court, the exhaustion requirement is satisfied, even if that court refused to consider them. *Manning v. Alexander*, 912 F.2d 878, 883 (6th Cir. 1990).

Section 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court recently revisited the standards of review for a § 2254(d) appeal. The "contrary to" prong allows a federal habeas court to grant a writ if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000). Furthermore, the "unreasonable application of" prong applies when "the state court identifies the correct legal

principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The state court's application must be clearly unreasonable as opposed to merely erroneous or incorrect. *Id.* at 1522.

The doctrine of adequate and independent state grounds applies to bar a federal habeas action when a state court declined to address a prisoner's federal claims because the prisoner failed to meet a state procedural requirement. *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750.

The existence of cause for a procedural default will ordinarily turn on whether the petitioner can show that some objective factor that was external to the defense impeded or prevented compliance with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Actual prejudice has been suffered when the improprieties upon which petitioner bases his claim "infect[ed] his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982).

In the instant case, Respondent has moved for dismissal or summary judgment with respect to all grounds for relief raised in the petition.

A. The Motion to Dismiss

Respondent has moved to dismiss grounds 1b, 4, 5, 6, 7, 9, and 10.

Ground 4: Ineffective Post-Conviction Counsel

Respondent argues that the allegation of ineffective assistance of post-conviction counsel is without merit as it is not a proper ground for habeas relief (Docket Entry No. 28 at 4-5, *citing Coleman*, 501 U.S. at 752).

Petitioner argues that an exception to this rule should exist when a constitutional claim can only be brought for the first time at the post-conviction level (Docket Entry No. 29 at 5). Petitioner believes that his right to effective appellate counsel should then extend to include effective post-conviction counsel, since his appellate counsel allegedly did not meet the minimum proscribed professional standards (*Id.*). "To conclude otherwise would mean that the defendant was not entitled [in] any forum to the effective assistance of counsel in presenting a constitutional claim" (*Id.*).

Though the Magistrate Judge finds Petitioner's arguments compelling, such a holding would eviscerate *Coleman*. "There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman*, 501 U.S. at 752 (internal citations omitted). For ineffective assistance of counsel to constitute cause, there must be "'a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable.'" *Id.*

at 753 (*quoting Carrier*, 477 U.S. at 488). "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* (internal citations omitted). When the state has no responsibility to guarantee competent counsel, "it is the petitioner who must bear the burden for failure to follow state procedural rules." *Id.* at 754.

As Ground 4 is inappropriate for habeas review, the Magistrate Judge concludes this ground must be **dismissed**.

Respondent contends that Grounds 1b, 5, 6, 7, 9, and 10 should be dismissed on grounds of Petitioner's procedural default.

Ground 1b: Ineffective Assistance of Appellate Counsel

While this issue is procedurally defaulted since it was not presented during Petitioner's collateral appeals to the Tennessee Court of Criminal Appeals ("TCCA") or Tennessee Supreme Court (Docket Entry No. 28 at 8), Petitioner asserts that the ineffective assistance of post-conviction counsel is adequate cause to excuse the default. Since petitioner has no right to effective post-conviction counsel, it logically follows that ineffective post-conviction counsel cannot constitute cause to excuse the procedural default. *See Colman, supra*. However, regardless of the procedural posture of this ground, it does not appear that Petitioner has stated a claim for constitutionally ineffective assistance of appellate counsel.

Petitioner believes his appellate counsel's failure to preserve certain issues for post-conviction and habeas review was not strategic and fails to meet the required reasonable standard of competency (Docket Entry No. 29 at 4).

Appellate counsel is not required to raise *every* non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). While Petitioner may disagree with some of his counsel's tactical decisions, "strategic choices made after a thorough examination of the law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonably [sic] precisely to the extent that reasonable professional judgments support the limitations on investigation." *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) (*quoting Strickland*, 466 U.S. at 690-91).

While ineffective assistance of appellate counsel may, in certain instances, constitute appropriate grounds for federal habeas review, the Magistrate Judge does not believe this case to be one of those instances.

Ground 5: Improper Denial of Motion to Suppress

Petitioner avers that the trial court improperly denied his motion to suppress statements he made that were obtained in violation of his Fifth Amendment right to Miranda warnings and his Sixth Amendment right to counsel. This ground concerns two statements: (1) one that was made during a questioning prior to Miranda rights being read and (2) another that was made after he was

taken to police headquarters. The TCCA described the circumstances surrounding the statements:

> Police investigators had developed him as a suspect, and they found him at the home of his female friend. The investigators invited him to accompany them to their police van. Equipped with a writing desk and tape recorder, the van served as a "field office."
>
> Once inside the van, Robert Moore, a detective sergeant, told Adams:
>
> > This is a very serious conversation we need to have. It's a serious matter that we feel like you may be involved with. And it concerns a death of Thomas Weser on the Vanderbilt campus.
>
> Moore took extraordinary pains to make Adams understand that he was not under arrest and that he was free to leave the van whenever he wished. Moore also emphasized to Adams that not enough information had been developed at that point to justify arresting him. Moore then asked Adams, "Are you involved in this case?" Adams answered, "Yes, but I did not shoot the man. I was there." Adams then described the vehicle used in the commission of the crime.
>
> At this point, Moore advised Adams of his rights under Miranda and asked him to ride with him or meet him at police headquarters. Adams chose to ride in the van. Upon arrival at headquarters, Moore assigned Detective Mike Smith to continue the investigation, introduced Adams to Smith, and left the two alone.
>
> Smith advised Adams of his Miranda rights, and Adams signed a waiver of those rights. He related some of the details of the crime to Smith.

> He reiterated that Crowell, not he, had killed Weser. Once Adams understood that he would be charged with the murder of Weser anyway, he asked to talk to his lawyer. The lawyer of his choice was contacted, and he talked to her. While being escorted to the magistrate's chambers, Adams told Smith, "Tell them I cooperated."

859 S.W. 2d 359, 361 (Tenn. Crim. App. 1992).

Judge Birch upheld the admission: "Findings of fact made by the trial judge after an evidentiary hearing of a motion to suppress are afforded the weight of a jury verdict, and this court will not set aside the trial court's judgment unless the evidence contained in the record preponderates against his findings". *Id.* at 362 (internal citations omitted).

Petitioner contends that his initial statement should have been suppressed as it was made during a custodial interrogation before he was advised of his *Miranda*[2] rights (Docket Entry No. 29 at 11). Petitioner argues that being the focus of two detectives' questioning in the cramped environment of a police mobile interrogation unit amounts to a custodial interrogation (*Id.* at 11-12). Petitioner further avers that the second statement should have been suppressed as unlawful "fruit of the poisonous tree." *See Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Moreover, Petitioner believes that the alleged ineffective assistance of appellate counsel he received is "cause" sufficient to excuse procedural default

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

of these Fifth and Sixth Amendment claims (Docket Entry No. 29 at 12).

Since appellate counsel chose not to appeal this issue to the Tennessee Supreme Court on the direct appeal, the issue was not preserved for habeas review and is procedurally defaulted. The procedural default may be excused allowing habeas review if the petitioner can demonstrate sufficient "cause and prejudice". *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The United States Supreme court recently held that a procedurally defaulted ineffective-assistance claim could serve as cause to excuse the procedural default of another habeas claim if "cause and prejudice" exists with respect to the ineffective-assistance claim. *Edwards v. Carpenter*, 529 U.S. ___, 120 S. Ct. 1587, 1590, 68 U.S.L.W. 4308 (April 25, 2000) (No. 98-2060). Because the ineffective assistance of post-conviction counsel can not serve as cause for the defaulted ineffective assistance of appellate counsel claim, the appellate counsel issue can not be considered as cause for the default of ground 5. However, in recognition of the circular nature of these standards and so as to avoid a potential miscarriage of justice, the Magistrate Judge will consider cause shown and proceed to a consideration of prejudice.

Petitioner must demonstrate actual prejudice rather than the "mere possibility of prejudice" resulting from the alleged constitutional error." *Russ v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Actual prejudice "must be a result of the alleged constitutional violation and not a result of the trial counsel's failure to meet state procedural guidelines." *Maupin*, 785 F.2d at 139. "[I]n analyzing the petitioner's contention of prejudice, the court should assume that the

petitioner has stated a meritorious constitutional claim . . . [and evaluate] whether [the petitioner] would have been prejudiced by such an error." *Id.* at 130 (*citing Frady*, 456 U.S. at 170-72). Assuming that appellate counsel was ineffective, prejudice exists since the claims are now barred from subsequent review. Therefore, the Magistrate Judge will deem the procedural default excused and turn to the merits of the claim.

Finding that "Smith had fulfilled the Miranda requirements and concluded that Adam's [sic] in-custody statement was a voluntary one," the TCCA affirmed the trial court's decision. 859 S.W.2d at 361-62.

§2254(d) allows the issuance of a writ of habeas corpus when the state decision is "contrary to" or an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court."

When determining whether a petitioner was a subject of a custodial interrogation triggering *Miranda* requirements, "a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). The trier of fact must evaluate "the objective circumstances of the interrogation" and not "the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* (*quoting Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). Warnings are not required just because the questioned person is a

"focus" or a suspect of the investigation but rather when there has been "such a restriction on a person's freedom as to render him in custody." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (per curiam); *California v. Beheler* 463 U.S. 1121, 1124 n2, 103 S. Ct. 3517, 77 L. Ed. 2d 275 (1983) (per curiam); *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S. Ct. 1136, 79 L. Ed.2d 409 (1984). *See also Stansbury, supra* at 324.

The petitioner and the detectives gave conflicting accounts of the questioning. Petitioner claims that he was handcuffed immediately upon entering the van, that he was not free to leave, and that he immediately requested his attorney upon entering the van (Docket Entry No. 20, Attachment, Transcript of Suppression Hearing at pp 68-70). In contrast, the detectives describe an amicable discussion in a van with the door open at all times with an unrestrained Petitioner, who was repeatedly assured that he was free to go at any time, and who could in fact leave at any point without officer assistance (*Id.* at 14-30).

The trial judge held that the statements were voluntary as Petitioner was not the subject of a custodial interrogation (*Id.* at 90). The trial court further found that Petitioner voluntarily gave the second statement after signing a waiver of rights and that the questioning was terminated upon invocation of his right to counsel. (*Id.* at 91).

State court determinations of fact are presumed to be correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(2). After a thorough review of the entire record, the Magistrate Judge finds neither sufficient evidence to overcome the presumption of correctness afforded state courts findings, nor any rationale

supporting the contention that the trial court's determination was an unreasonable application of federal law. Consequently, the Magistrate Judge believes this ground should be dismissed as without merit and that Petitioner's statements were properly admitted.

Ground 6: Consecutive Sentencing

Petitioner believes habeas review of his sentencing is necessary inasmuch as his Fifth Amendment right to due process was violated when the court ordered consecutive sentences. In addition, Petitioner alleges that the ineffective assistance of appellate counsel is sufficient cause to excuse the procedural default.

Petitioner fails to articulate how his due process rights are implicated. Petitioner's Fifth Amendment rights are not implicated as sentencing issues are matters of state law. Since federal reviewing courts are bound by state court determinations of state law, the Magistrate Judge rejects Petitioner's contentions as inappropriate for federal habeas review. *See Estelle v. McGuier*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("[i]t is not the province of a federal habeas court to re-examine state-court determinations on state-law questions."); *Caldwell v. Russell*, 181 F.3d 731, 736 (6th Cir. 1999). The Magistrate Judge finds this ground should also be dismissed.

Ground 7: Confrontation Clause Claim

Petitioner's claim that his Confrontation Clause rights were violated when his co-conspirator's statement was improperly admitted into evidence also falls into the category of the above two claims where the ineffectiveness

of appellate counsel serves as cause to allow the Magistrate Judge to examine the merits of the issue.

A state witness testified that Petitioner and his co-defendant, Crowell, were together shortly before and shortly after the robbery and killing. 859 S.W.2d at 363. The witness testified to hearing Crowell say that "he'd shot someone before and he could shoot [another person] also." *Id.* To counter this testimony suggesting that Crowell was the shooter, the state offered the testimony of an investigative detective who claimed that Crowell accused Petitioner of being the shooter. *Id.* After the detective's statement, the trial judge "cautioned the jury that the testimony was to be considered only as if [sic] it might affect the credibility of Crowell's statement as contained in [the witness'] testimony." *Id.* Over objections, the trial court found the statement admissible under Rule 806[3] of the Tennessee Rules of Evidence. *Id.* The TCCA also found that the admission of the statements was authorized under rule 806 and that the limiting instruction given by the court was sufficient. 859 S.W.2d at 363.

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[3] Rule 806 of the Tennessee Rules of Evidence provides:

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause "ensure[s] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The Confrontation Clause permits the admission of hearsay evidence when the witness is unavailable and the statement is clearly reliable. *Idaho v. Wainwright*, 497 U.S. 805, 814, 100 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 815.

In 1999, the Supreme Court addressed this exact issue: the reliability of a confession by an accomplice which incriminates a criminal defendant, *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). In *Lilly*, an accomplice told police during questioning that the petitioner actually stole a gun and shot someone. (*Id.* at 1889). At petitioner's trial, when the accomplice invoked his Fifth Amendment right against self-incrimination, the trial court admitted the accomplice's statements during questioning under the hearsay exception of a declaration of an unavailable witness against penal interest. The petitioner objected as the statements shifted the blame from the accomplice to the petitioner, violating the Sixth Amendment Confrontation Clause. (*Id.* at 1890). The petitioner was subsequently convicted.

On appeal, the Virginia Supreme Court found the admission constitutional since it fell within a "firmly rooted" hearsay exception. The United States Supreme Court disagreed and reversed.

After tracing the history of hearsay exceptions, the *Lilly* court addressed the category of statements like the one in the instant case. They found that those hearsay statements are "inherently unreliable" and "ought to be received with suspicion. . . . '" *Id.* at 131 (*quoting Crawford v. United States*, 212 U.S. 183, 204, 29 S. Ct. 260, 53 L. Ed. 465 (1909). As such, the *Lilly* court held that "accomplice's confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id.* at 134. These statements carry a presumption of unreliability that may be rebutted with "particular guarantees of trustworthiness." *Id.* at 136. While instructing courts to independently review the factual circumstances surrounding the hearsay statement, the *Lilly* court doubted the presumption of unreliability could be overcome when the government was highly involved in the statement's production. *Id.* at 137. Although corroborating evidence existed, the Court found the statements in question to have violated the petitioner's Confrontation Clause rights. *Id.* at 139. Thus, the appropriate standard of review is whether the hearsay evidence "possess[es] indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial[4]." *Id.* at 138 (*quoting Wright*, 497 U.S. at 822).

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[4] "When a court can be confident – as in the context of hearsay falling within a firmly rooted exception – that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,' the Sixth Amendment's residual trustworthiness test allows the admission of the declarant's statements." *Id.* at 136 (*quoting Wright*, 497 U.S. at 820). "But the

(Continued on following page)

In the case sub judice, Crowell's accusatory statement is clearly the type contemplated by *Lilly*. While a limiting instruction was given, limiting instructions are an inadequate remedy; "the effect is the same as if there was no limiting instruction at all." *Bruton v. United States*, 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Consequently, the Magistrate Judge must determine whether Crowell's statements bore "sufficient indicia of reliability" as to be "inherently reliable." Just as in *Lilly*, Crowell was in custody for a serious crime, "made his statement[ ] under the supervision of governmental authorities," and "had a natural motive to attempt to exculpate himself as much as possible." *Id.* at 139. Consequently, the Magistrate Judge believes Crowell's statement to be unreliable and the admission thereof violative of Petitioner's Confrontation Clause right.

Finding that the admission was clearly erroneous, the Magistrate Judge believes this ground to be meritorious and that it should be preserved for further review.[5] If this Report and Recommendation is adopted by the District Court, a hearing will be necessary to determine if the error was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1992) (holding that an error was not harmless if "the error had a substantial and

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surrounding circumstances relevant to a Sixth Amendment admissibility determination do not include the declarant's in-court demeanor (otherwise the declarant would be testifying) or any other factor uniquely suited to the province of trial courts." *Id.* at 137.

[5] The parties did not have the benefit of the *Lilly* case when they submitted their briefs. However, the *Lilly* court made it clear that they were reiterating a well-established rule, rather than announcing a new rule of law. 527 U.S. at 133.

injurious effect or influence in determining the jury's verdict.").

Ground 9: Actual Innocence

Petitioner asserts his actual innocence as he was not involved in the murder and robbery of Thomas Weser or the convenience store robbery. In both instances, he claims to have been merely present in the automobile and ignorant of his co-defendant's intentions (Docket Entry No. 23 at 21-22; Docket Entry No. 29 at 18). Petitioner further contends that the nine alleged independent Constitutional violations asserted herein "'probably resulted in the conviction of one who is actually innocent'" (Docket Entry No. 29 at 18 (*citing Carrier*, 477 U.S. at 496)). Without stipulating the exact nature thereof, Petitioner believes that he can show proof of his actual innocence at an evidentiary hearing.

Respondent argues this issue should be dismissed as procedurally defaulted, as it has not been raised in any prior state proceeding (Docket Entry 28 at 7). Respondent further contends that neither new evidence nor an independent constitutional violation which could not have been previously discovered through the exercise of due diligence have been presented here (*Id.*). Petitioner neither argues cause and prejudice nor presents new evidence.

Legitimate claims that a constitutional error has resulted in the conviction of an innocent person are extemely [sic] rare. *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998). "To be credible, such a claim requires

petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* Furthermore, the petitioner must demonstrate that it is more likely than not that a reasonable juror would have acquitted him in light of the new evidence. *Id.* at 327; *Bousley*, 523 U.S. at 623. "In assessing the adequacy of petitioner's showing, . . . the reviewing tribunal . . . [may] consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.*

Even if the Magistrate Judge were to excuse the procedural default, Petitioner provides no new documentary evidence of his factual innocence not presented at trial, but only conclusory allegations of prejudice from alleged constitutional errors. Absent such a showing of factual innocence, review is inappropriate. The Magistrate Judge believes this issue should be dismissed.

Ground 10: Insufficiency of Evidence

Finally, the petitioner challenges the constitutional sufficiency of the trial evidence supporting his conviction. However, he procedurally defaulted that contention by neglecting to assert it via his petition for review before the Tennessee Supreme Court. *See Carrier*, 477 U.S. at 485. A federal habeas forum may excuse a procedural default if a "fundamental miscarriage of justice" will otherwise result. *Coleman*, 501 U.S. at 750. Petitioner avers that fundamental justice requires the Magistrate Judge, on collateral review, to reevaluate the constitutional sufficiency of the trial evidence. Petitioner believes that, at most, the evidence supports a conviction of the lesser included

offense of accomplice liability (Docket Entry No. 23 at 22). Supporting his contention, Petitioner refers to his co-defendant's failure to testify and that no one could identify or place Petitioner at the scenes of the crimes (*Id.*). Even if the Magistrate Judge were to excuse the procedural default, the outcome would not change.

Trial evidence is sufficient to support a conviction if, after viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the prosecution, the reviewing court can conclude that a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

In the case sub judice, after evaluating all the evidence and testimony, the jury concluded that Adams was in fact guilty of the charges presented. Petitioner maintained his innocence at all relevant times. However, a defendant may be convicted of a crime in accordance with due process strictures "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 315. Although this issue is not ripe for review as Petitioner has not made the requisite cause and prejudice showing, the Magistrate Judge believes that Petitioner has also not sufficiently demonstrated that "any rational trier of fact could [not] have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Consequently, the Magistrate Judge finds that this issue should be dismissed.

B. Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2538, 2553, 91 L. Ed. 2d 265 (1986). The substantive law governing the claims will identify which facts are material. In determining whether the movant has met its burden, the Court must view the evidence in light most favorable to the non-moving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

In order to defeat the motion, the non-moving party is required to show, after an adequate time for discovery, that a genuine issue of fact exists as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S. Ct. at 2553. In making this showing, the non-moving party may not merely rest on conclusory allegations contained in the compliant [sic], but must produce affirmative evidence supporting her claims. *Id.* In order to create a genuine factual issue, the non-moving party must show "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

Ground 1a: Effectiveness of Trial Counsel

Petitioner argues that there are five grounds on which his trial counsel was ineffective: (1) for failing to interview witnesses, (2) for failing to challenge inconsistent testimony, (3) for failing to investigate and impeach the co-defendant's credibility regarding prior drug use, (4) for failing to challenge an in-court identification, and (5) for failing to object to the jury instruction on reasonable doubt. (Docket Entry No. 23 at 5).

On collateral appeal, the TCCA noted:

> The trial court also addressed the Petitioner's contention that defense counsel failed to investigate the case adequately. Mr. Dean testified that their investigator conducted a thorough investigation, and that they explored the statements made by the co-defendant and investigated the crime scene. The office spent twenty-eight hours or more on the case.
>
> * * *
>
> The trial counsel also found that counsel's failure to interview Lisa Cantrell's parents did not overcome the presumption that Mr. Dean's decision was trial strategy. . . . Also, the trial court found that counsel legitimately did not introduce evidence of the co-defendant Crowell's drug use because he felt there had been sufficient testimony presented by the State. . . . In its conclusion, the trial court found that Mr. Dean and Ms. Dykes had significant trial experience and that they were well-prepared for the trial. As a result,

> their representation was well within the necessary range of competence for criminal defense attorneys.

Adams v. State, No. 01C01-9606-CR-00401, 1997 WL 803585, at *4 (Tenn. Crim. App. Dec. 30, 1997). The TCCA concluded that the evidence did not preponderate against the trial court's conclusion that petitioner received competent representation. Nor did they find sufficient prejudice to Petitioner. *Id.* at *5.

The issue of ineffective assistance of counsel is a mixed question of law and fact. *Rickman v. Bell*, 131 F.3d 1150, 1153, (6th Cir. 1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996). Mixed questions of law and fact follow the unreasonable application prong of § 2254(d). *See Nevers v. Killinger*, 169 F.3d 352, 358 (6th Cir. 1999). "Unreasonable" does not mean "incorrect." *Williams v. Taylor*, 120 S. Ct. 1495, 1522 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.*

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the petitioner must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness. While examining counsel's overall performance, the errors must have been so egregious that counsel was not functioning in that role. *Id.* His acts or omissions must have

been "outside the wide range of professionally competent assistant." *Id.* at 690. Second, the petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Id.* at 687. Prejudice exists if there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Furthermore, counsel's performance must have been so deficient that it "renders the result of the trial unreliable, or proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993).

Petitioner's counsel is presumed to have been competent unless Petitioner is able to clearly demonstrate otherwise. *See United States v. Pierce*, 63 F.3d 818, 833, (6th Cir. 1995). Not only does Petitioner present solely conclusory allegations of prejudice with little to no concrete factual support, (*see* Docket Entry No. 23 at 5-6 and Docket Entry No. 29 at 2-3), but Petitioner also fails to demonstrate how the State's determination is an unreasonable application of Supreme Court precedent. In contrast, the *Williams* court found ineffective assistance of counsel when:

> The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. . . . They filed [sic] to conduct an investigation that would have uncovered extensive records graphically describing William's nightmarish childhood, . . . that William's parents had been imprisoned for criminal neglect of Williams . . . that Williams had been severely and repeatedly beaten by his father, . . . that Williams was "borderline mentally retarded" and did not advance beyond the sixth grade in school. . . . They failed to seek prison

> records recording Williams' commendations for helping crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." . . . Counsel failed to even return the phone call of a certified public accountant who had offered to testify when Williams was incarcerated as part of a prison ministry program.
>
> . . .
>
> Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of defendant's background.

Williams, 120 S. Ct. at 1514-15. Petitioner fails to present evidence of an even remotely similar nature. As such, the Magistrate Judge finds that the evidence does not demonstrate any issue of material fact and that summary judgment for Respondent is appropriate on this issue.

Ground 2: Consolidation of Indictments

Petitioner alleges that the trial court's consolidation of his indictments violated his Fifth and Fourteenth Amendment rights (Docket Entry No. 29 at 6).

In arguing for consolidation, the State argued that the crimes were committed with the same intent: obtaining money with which to purchase drugs. The State believed the cases "overlapped" sufficiently to establish a common plan or scheme.

The trial court found consolidation of the indictments appropriate under Rules 8 and 13 of the Tennessee Rules of Criminal Procedure: "offenses that constitute part of a common scheme or plan or . . . [are] of the same or similar character," and offenses that could have been joined in a single indictment. The trial court also relied upon *State v. Peacock*, 638 S.W.2d 837 (Tenn. Crim. App. 1982), finding "two or more offenses must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s)." *Id.* at 840. However, *Peacock* continues: "[t]he mere fact that a defendant has committed a series of armed robberies, or a series of rapes, or a series of crimes does not mean that they are part of a common scheme or plan although the offenses may be of the same or similar character." *Id.*

The TCCA held the indictments to have been erroneously consolidated, but that the error was harmless. 859 S.W.2d at 363.

Petitioner contends that the erroneous consolidation deprived him of his right to a fair trial and that the evidence does not support a finding of harmless error beyond a reasonable doubt. Petitioner believes he was prejudiced in that the State used evidence obtained in the murder of Weser to convict him of the convenience store robbery. Petitioner further contends that there is absolutely no evidence that he was involved in the convenience store robbery (Docket Entry 23 at 8). Petitioner also claims that the consolidation allowed the State to put forth the theory that Petitioner planned the criminal escapades with Crowell, with no supporting evidence (Docket Entry No. 29 at 7).

"The consolidation of indictments, or of counts in the indictment, is generally within the discretion of the trial court and its action will not be reversed in the absence of an abuse of that discretion." *Moeller v. United States*, 378 F.2d 14, 15 (5th Cir. 1967). *See also United States v. Haygood*, 502 F.2d 166 (7th Cir. 1974), *cert denied*, 419 U.S. 1114 (1975). To prevail, a petitioner must clearly demonstrate that the jury was unable to distinguish the facts and evaluate each count of the indictment separately. *See United States v. Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985); *United States v. Fajardo*, 966 F.2d 1454, 1992 WL 127022 (6th Cir. (Mich.), June 9, 1992). The evaluating court must examine the trial record as a whole, ignoring harmless errors. *United States v. Lane*, 474 U.S. 438, 445, 106 S. Ct 725, 88 L. Ed. 2d 814 (1986).

An error is harmless if it does not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1992). The TCCA concluded the error was harmless "because the evidence of guilt adduced against [Petitioner] in both cases was abundant and legally sufficient. In our view, the result would have been the same were the cases tried before different juries." 859 S.W.2d at 363.

The Magistrate Judge fails to see how the TCCA's determination of harmless error "was an unreasonable determination of facts in light of the evidence presented in the State court proceeding." §2254(d)(2). Consequently, the Magistrate Judge believes habeas review to be inappropriate and recommends that summary judgment be granted for Respondent on this issue.

Ground 3: Jury Instruction on the Burden of Proof

Petitioner contends that the jury instruction misstated the necessary burden of proof. Although this issue was not raised before the trial court, petitioner included it in his collateral appeals to the TCCA and the Tennessee Supreme Court. TCCA found the issue to be without merit though improperly before the court. *Adams*, 1997 WL 803584 at *4. TCCA also noted that the Tennessee Supreme Court had recently affirmed a decision holding that similar language did not constitute a due process violation. *Id.*

Petitioner contends that the instruction was unconstitutional as it stated that the "jurors were told that they needed only to reach a 'satisfactory conclusion' [that Petitioner] committed the offense; that they only be 'morally certain[ ] of his guilt; and that they could convict merely if they could 'let the mind rest easily upon the certainly [sic] of guilt'" (Docket Entry No. 23 at 10-11). The instruction actually read:

> When the evidence is made up entirely of circumstantial evidence, then before you would be justified in finding the defendant guilty, you must find that all the essential facts are consistent with the hypothesis of guilty, as that is to be compared with all the facts proved; the facts must exclude every other reasonable theory or hypothesis except that of guilt; and the facts must establish such a certainty of guilt of the defendant as to convince the mind beyond a reasonable doubt that the defendant is the one who committed the offense. It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury beyond a reasonable doubt of all

> the facts necessary to constitute the crime charged. Before a verdict of guilty is justified, the circumstances, taken together must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing, in effect, a moral certainty that the defendant, and no one else, committed the crime.
>
> * * *
>
> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required as to every proposition of proof requisite to the offense.

(Docket Entry No. 23 at 8; r.15, Addendum 7, Jury Instructions, p. 732-33). Petitioner believes this instruction is unconstitutional because it provides a lesser standard than the strenuous "beyond a reasonable doubt' standard. *See Cage v. Louisiana*, 498 U.S. 39, 40, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990).

In contrast, Respondent contends that the claim should be rejected as the instruction is "nearly identical" to that upheld in *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997), *cert. denied*, 532 U.S. 1079, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (1998) (Docket Entry No. 28 at 15). The relevant instruction in *Austin* stated:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise

> from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Id. at 846. The Sixth Circuit held that the instruction was constitutional, it did not resemble the *Cage* instruction, and it did not lower the standard of proof. *Id.*

Jury instructions must be reviewed as a whole to determine whether they adequately and fairly informed the jury of relevant considerations and explained the applicable law. *United States v. Layne*, 192 F.3d 556, 574 (6th Cir. 1999) (citations omitted); *United States v. Harrod*, 168 F.3d 887, 890 (6th Cir. 1999) (citations omitted). "[T]o warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair." *Scott v. Mitchell*, 209 F. 3d 854, 882 (6th Cir. 2000) (*citing Coe*, 161 F.3d at 329). "This burden is even greater than that required to demonstrate plain error on direct appeal. . . . The question in such a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, . . . , not merely whether the instruction is undesirable, erroneous, or even universally condemned")." *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977) (internal citations omitted).

The Magistrate Judge believes that Petitioner incorrectly argues that this instruction is "nearly identical" to

that overruled in *Cage*[6] and believes the language to be similar to the *Austin* instruction. The *Cage* court reviewed the charge by reference to what a reasonable juror would have found the charge to be and held that the words "grave" and "substantial" indicate a higher degree of doubt than that required, compelling the court to reverse the petitioner's conviction. *Id.* at 41. Those specific, highly charged words are not used in the instant charge. Furthermore, the Magistrate Judge is presented with no evidence showing the "ailing instruction so infected the entire trial that the resulting conviction violates due process." *Henderson*, 431 U.S. at 154. Consequently, the Magistrate Judge believes summary judgment for Respondent is appropriate on this issue as there is not any genuine issue of material fact.

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[6] The relevant instruction in *Cage* was:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilty [sic] beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

111 S. Ct. at 40.

IV. RECOMMENDATION

In light of the foregoing, the Magistrate Judge recommends that Respondent's Motion to Dismiss be **GRANTED** as to issues 1b, 4, 5, 6, 9, and 10, and **DENIED** as to issue 7, and that Respondent's Motion for Summary Judgment be **GRANTED**.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed in this Report in which to file any response to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation and can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

ENTERED this 28 day of June, 2000.

/s/ Joe B. Brown
JOE B. BROWN
United States Magistrate Judge

(5)

Supreme Court, U.S.
FILED
FEB 9 - 2004
OFFICE OF THE CLERK

No. 03-821

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

FLORA HOLLAND, Warden,
Petitioner

v.

FRANK E. ADAMS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*

Respondent Frank Adams respectfully moves this Court to proceed *in forma pauperis*. In the lower courts, Frank Adams was found to be indigent and was appointed counsel under 18 U.S.C. §3006A. His motion to proceed *in forma pauperis* should be granted.

Respectfully Submitted,

Paul R Bottei

* Paul R. Bottei
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* Counsel of Record

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion to proceed *in forma pauperis* has been served via first-class mail postage prepaid upon Gordon Smith, Counsel for the Respondent, Office of the Attorney General, State of Tennessee, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 9th day of February, 2004.

Paul R Bottei

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RESPONDENT'S BRIEF IN OPPOSITION

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* Counsel of Record

QUESTIONS PRESENTED

1. Should this Court should grant certiorari to review the interlocutory order of the court of appeals which holds that petitioner's *Bruton* claim was properly exhausted in accordance with Tennessee procedural law, and which vacated and remanded for further proceedings?

2. Should this Court grant certiorari where the court of appeals applied to the facts a rule of law on which the circuits all agree, *viz.* a state court can promulgate a rule identifying what remedies are "available" for purposes of exhaustion under 28 U.S.C. §2254?

3. Should this Court grant certiorari to interpret and apply Tennessee Supreme Court Rule 39 where the court of appeals applied the law to the facts; where the court of appeals is in a unique, favored position to interpret and apply Tennessee law; where Petitioner raises facts and issues for the first time in this Court; and where the court of appeals' interpretation and application of Rule 39 was correct in light of the express terms of Rule 39, its preamble, and the policy which it embodies?

4. Is Frank Adams entitled to federal habeas review of his *Bruton* claim?

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STATEMENT OF FACTS

Frank Adams was convicted of first-degree murder based upon the custodial statement of Timothy Crowell, a nontestifying co-defendant who owned the murder weapon but claimed in his statement that Frank Adams shot the victim. On direct appeal to the Tennessee Court of Criminal Appeals, Frank Adams asserted that the jury's consideration of Crowell's statement violated his right to confrontation under Bruton v. United States, 391 U.S. 123 (1968). The Tennessee Court of Criminal Appeals denied this claim, and Frank Adams did not specifically request, pursuant to Tenn.R.App.P. 11, that the Tennessee Supreme Court review that claim a second time.

After pursuing state post-conviction remedies, Frank Adams then raised his *Bruton* claim in a federal petition for writ of habeas corpus. The United States Magistrate initially concluded that admission of Crowell's unconfronted custodial statement violated *Bruton*, leaving for resolution the question whether the error was harmless. As the Magistrate explained:

> Crowell was in custody for a serious crime, 'made his statement[] under the supervision of governmental authorities,' and 'had a natural motive to attempt to exculpate himself as much as possible'. . . Consequently, the Magistrate Judge believes Crowell's statement to be unreliable and the admission thereof violative of Petitioner's Confrontation Clause right.

Supp.App. 21. The District Judge, however, overruled the Magistrate and dismissed the claim as procedurally barred. App. 47.

On June 28, 2001, the Tennessee Supreme Court promulgated Tenn.S.Ct. R. 39 in order to "clarify" Tennessee law whether second-tier review in the Tennessee Supreme Court has been necessary to exhaust state remedies under 28 U.S.C. §2254(b) & (c). In Rule 39, the Tennessee Supreme Court made clear that as to "*all appeals* from criminal convictions or post-conviction relief matters from and after July 1, 1967," "when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have

exhausted all available state remedies available for that claim." Tenn.S.Ct.R. 39. See App. 68-69.

In light of Rule 39, the Sixth Circuit granted Frank Adams a certificate of appealability on his *Bruton* claim and ultimately concluded that the District Court erred in holding that the claim was unexhausted and therefore procedurally defaulted. In reaching this conclusion the Sixth Circuit explained: (1) The Tennessee Supreme Court could properly promulgate a rule declaring whether second-tier appellate review in the state supreme court was necessary to exhaust state remedies (App. 5-10); and (2) Adams' claim is not unexhausted, because Tennessee law (as expressed in Rule 39) had not required him to seek discretionary review in the Tennessee Supreme Court following the Court of Criminal Appeals' denial of the *Bruton* claim. App. 10-14. The Sixth Circuit vacated the District Court's judgment and remanded for further proceedings on the merits of the *Bruton* claim. App. 17.

REASONS THE PETITION SHOULD BE DENIED

The petition should be denied for no fewer than five reasons: (1) The case is in an interlocutory posture; (2) There is no conflict among the circuits concerning whether a state court can identify "available" remedies for purposes of exhaustion; (3) Petitioner is thus only asking this Court to apply a properly stated principle of law to the unique facts of this case; (4) Institutionally, this Court is in a worse position to interpret Tennessee law, which is best left to the Sixth Circuit; and (5) Even so, the Sixth Circuit's application of the law to the facts is unquestionably correct in light of the express terms of Rule 39 and the state policy which it expresses.

I.
THIS CASE COMES TO THE COURT IN AN INTERLOCUTORY POSTURE

The court of appeals below vacated the denial of habeas relief and remanded the case for

further proceedings. App. 17. Thus, there is no final judgment in the lower courts on Frank Adams' petition for writ of habeas corpus.[1] Given the remand to the district court and the lack of a final judgment in the lower courts, this case comes to the court in an interlocutory posture: Certiorari should thus be denied.

As Justice Scalia has recognized: "We generally await a final judgment in the lower courts before exercising our certiorari jurisdiction." Virginia Military Institute v. United States, 508 U.S. 946 (1993)(Scalia, J., concurring). Thus, where a court of appeals has remanded a case to the United States District Court, the case "is not yet ripe for review by this Court." Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 328 (1967)(per curiam) (denying certiorari where "the court of appeals remanded the case."); Virginia Military Institute, 508 U.S. at 946 (Scalia, J., concurring)(certiorari denied where court of appeals vacated the judgment and remanded the case to district court); See American Construction Company v. Jacksonville, Tampa & Key West Railway Co., 148 U.S. 372, 384 (1893)(certiorari is not appropriate to review a case in an interlocutory posture except when "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

Given the interlocutory posture of the case, therefore, certiorari should be denied – especially where certiorari is unwarranted for numerous other reasons, explained *infra*. See also Columbia Union College v. Clark, 527 U.S. 1013, 1015 (1999)(Thomas, J., dissenting)(noting that certiorari was denied "perhaps because this case comes to us in an interlocutory posture."); Harris v. United States, 404 U.S. 1232, 1235 (1971) (Douglas, J.)(noting that certiorari was denied with "the

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[1]With Petitioner Holland having not requested a stay of the mandate, the District Court has already undertaken further proceedings concerning Frank Adams' pending *Bruton* claim. See e.g., Adams v. Holland, No. 3:99-0519 (M.D.Tenn.), R. 49, R. 50, R. 51.

interlocutory posture of the case" possibly being the "determining factor.")

II.
THERE IS NO CONFLICT IN THE CIRCUITS CONCERNING A STATE COURT'S ABILITY TO STRUCTURE ITS OWN COURT SYSTEM AND IDENTIFY AVAILABLE REMEDIES FOR PURPOSES OF EXHAUSTION

As the Sixth Circuit correctly recognized, "*[E]very* other lower court that has considered, post-*O'Sullivan*, the effect of a rule like Rule 39 has held that such a rule permissibly eliminates state supreme court review as an available state remedy that must be exhausted." App. 10. Indeed, like the Sixth Circuit below, the Third, Eighth, and Ninth Circuits have recognized that states may identify second-tier review in a state supreme court as being "unavailable" for purposes of exhaustion. Wenger v. Frank, 266 F.3d 218 (3d Cir. 2001); Randolph v. Kemna, 276 F.3d 401 (8th Cir. 2002); Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999).

That the circuits are unanimous is not surprising, given this Court's pronouncement in O'Sullivan v. Boerckel, 526 U.S. 838 (1999) that "there is nothing in the exhaustion doctrine requiring the federal courts to ignore a state law or rule providing that a given procedure is not available." Id. at 847-848. Comity and federalism underlie the exhaustion doctrine, and those interests would be expressly *disserved* if federal courts were allowed to ignore a state court's identification of available remedies under state law – as Tennessee has done through Rule 39. Indeed, "It would be a strange rule of federalism that ignores the view of the highest Court of a State as to the meaning of its own law." Stringer v. Black, 503 U.S. 222, 235 (1992).

The lower courts have thus unanimously – and properly – recognized the principle that federal courts are obligated to defer to state rules describing available state remedies for purposes of exhaustion. Because the lower courts are not in conflict, there is no "compelling reason"

(U.S.S.Ct.R. 10) to grant certiorari and the petition should be denied. See U.S.S.Ct.R. 10(c).

III.
PETITIONER IS MERELY REQUESTING APPLICATION OF A PROPERLY STATED RULE OF LAW TO THE UNIQUE FACTS OF THIS CASE

In the absence of a conflict among the circuits, Petitioner instead asks this Court to decide two issues concerning the Sixth Circuit's application of *O'Sullivan v. Boerckel* to Tennessee Supreme Court Rule 39. See Petition For Writ Of Certiorari, p. i. As noted *supra*, however, there is no lower court conflict concerning the propriety of a state court promulgating a rule identifying second-tier review as "unavailable," and in fact, the promulgation of such rules is permitted by *O'Sullivan*. The petition thus boils down to a request that this Court evaluate Tennessee law as expressed in Rule 39 and *O'Sullivan* to decide: (1) whether the Sixth Circuit misapplied the "unavailablility" principle of 28 U.S.C. §2254(c) and *O'Sullivan* to conclude that Rule 39 is unavailable (Question #1) and (2) whether the Sixth Circuit's application of Rule 39 to Frank Adams' claim was improper (Question #2). Indeed, even the petition specifically makes clear that it questions "the Sixth Circuit's application of" Rule 39. See Petition, p. 15.

Such alleged misapplication of a unanimously applied legal principle to the unique facts of this case does not provide a basis for granting certiorari. U.S.S.Ct.R. 10 (alleged misapplication of properly stated rule of law not basis for certiorari). This is so, especially where (as explicated *infra*) the Sixth Circuit decision is correct (See *infra*, pp. 7-10), and the Sixth Circuit thus did not "patently err" in concluding that under Tennessee law, since 1967, second-tier review in the Tennessee Supreme Court has not been required under Tennessee law. See Kyles v. Whitley, 514 U.S. 419, 457, 458 (1995)(Scalia, J., dissenting). Thus, this Court should deny certiorari, as it has previously when

a court of appeals has applied a state court rule such as Rule 39 to the specific facts of particular case. See e.g., Wenger v. Kyler, 535 U.S. 957 (2002).

IV.
INSTITUTIONALLY, THIS COURT MUST PROPERLY DEFER TO THE COURT OF APPEALS' INTERPRETATION AND APPLICATION OF TENNESSEE LAW, AND PETITIONER IS IMPROPERLY ASKING THIS COURT TO REVIEW, IN THE FIRST INSTANCE, VARIOUS ASPECTS OF TENNESSEE LAW

Just as the federal courts must defer to state rules governing exhaustion, this Court must properly defer to the court of appeals' interpretation and application of Tennessee law. As an institutional matter, where interpretation of state law is at issue, this Court has a "settled practice of according respect to the courts of appeals' greater familiarity with issues of state law."DeBuono v. NYSA-ILA Medical And Clinical Services Fund, 520 U.S. 806, 810 n. 5 (1997); Mills v. Rogers, 457 U.S. 291 (1982)(noting that court of appeals was "better situated than we to determine" status of state law); Walker v. Armco Steel Corp., 446 U.S. 740, 748 (1980)(noting deference to court of appeals which was "more familiar than we with state law.").

This is especially true in cases involving questions about state procedures necessary to preserve claims for federal habeas review: In such cases, this Court has not hesitated to acknowledge that the court of appeals is better situated to resolve the nuances of state procedural law. Selvage v. Collins, 494 U.S. 108, 110 (1990)(per curiam)(remanding to court of appeals for interpretation of Texas' procedural bar rules, because "The Court of Appeals for the Fifth Circuit is more familiar with Texas law than we are."); Rummel v. Estelle, 445 U.S. 263, 267 n. 7 (1980)(deferring to the court of appeals' interpretation of Texas law concerning existence of procedural default).

Adherence to this principle of restraint is especially compelling here, where Petitioner is asking that this Court decide the issues by considering arguments based on numerous Tennessee

rules,[2] a Tennessee Advisory Committee note,[3] and several reports[4] – none of which were presented or argued to the lower courts. Not only are such matters waived because they were never presented to the lower courts, it is clear that this Court is not an appropriate forum for interpreting *in the first instance* myriad state court rules and studies which Petitioner failed to present or argue to the court of appeals. See Equal Employment Opportunity Commission v. Federal Labor Relations Board, 476 U.S. 19 (1986)(certiorari dismissed where petitioner's arguments not properly presented to lower courts and failure brought to attention in brief in opposition). The petition should be denied.[5]

V.

THE SIXTH CIRCUIT'S INTERPRETATION AND APPLICATION OF TENNESSEE LAW IS UNQUESTIONABLY CORRECT: BY ITS EXPRESS TERMS, RULE 39 APPLIES TO ALL CASES SINCE 1967; PETITIONER'S CONTRARY INTERPRETATION OF TENNESSEE LAW IGNORES THE EXPRESS TERMS OF RULE 39, DISSERVES COMITY, AND TURNS THE POLICY OF THE STATE OF TENNESSEE ON ITS HEAD

Fundamentally, the court of appeals' interpretation and application of Rule 39 to Frank Adams' case was correct, for several salient reasons:

1. By its express terms, Rule 39 announces what Tennessee procedure has been since

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[2] See e.g., Tenn.R.App. 3 (Petition, p. 10), Tenn.R.App. 11 (Petition, p. 10), Tenn.S.Ct.R. 13 (Petition, p. 12), Tenn.S.Ct.R. 14 (Petition, pp. 12-13), Tenn.S.Ct.R. 28 (Petition, p. 13). See Petition, Table Of Contents, p. v.

[3] Tenn.S.Ct.R. 39 Advisory Committee Notes (Petition, pp. 11-12).

[4] Petition, p. 12.

[5] In addition, the Honorable Martha Craig Daughtrey sits on the Sixth Circuit, and she served on both the Tennessee Court of Criminal Appeals (for 15 years) *and* the Tennessee Supreme Court (for 3 years). It is thus "rather sensible" to defer to the judgment of the court of appeals on this issue of state law. Compare Salve Regina College v. Russell, 499 U.S. 225, 241 (1991)(Rehnquist, C.J., dissenting)("rather sensible" for court of appeals to give some deference to district judge with 18 years of experience with state law and practice).

1967: No application for permission to appeal has been required for any claim presented in "all appeals" since 1967. Rule 39 explicitly applies to:

> *all appeals* from criminal convictions or post-conviction relief matters *from and after July 1, 1967*, [the date the Tennessee Court of Criminal Appeals was established]

App. 68. The Rule further provides that when a claim has been presented to the Tennessee Court of Criminal Appeals, that claim is deemed exhausted. Id. Petitioner's assertion that Tennessee law required an application for permission to appeal for in 1993 completely overlooks the operative "all appeals . . . from and after July 1, 1967" language, which establishes that Rule 39 expresses what Tennessee law has always been. For Petitioner to claim that Frank Adams' case is not embraced by the phrase "all appeals . . . from and after July 1, 1967" is to render that phrase meaningless.

Needless to say, one cannot read operative language out of a state rule without misinterpreting that rule and offending comity as a result. Petitioner ignores the "all appeals . . . from and after July 1, 1967" language. The court of appeals has not. App. 12 (discussing express language contained in Rule 39). The court of appeals is thus correct, and Petitioner's contrary interpretation is wrong, as it flies in the face of settled principles that a statute or rule must be interpreted according to its plain meaning,[6] operative terms must be given effect, and terms may neither be ignored nor rendered meaningless.[7]

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[6] Alabama v. Bozeman, 533 U.S. 146 (2001)(courts must apply rules and statutes literally); Moskal v. United States, 498 U.S. 103 (1990)(courts must apply statutory language by its plain meaning); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)(where language of rule or statute is plain, courts must enforce it according to its terms); United States v. Rodgers, 466 U.S. 475, 484 (1984); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); Caminetti v. United States, 242 U.S. 470, 485 (1917).

[7] TRW v. Roberts, 534 U.S. 19 (2001)(cardinal principle of construction is that no clause, sentence or word should be rendered superfluous, void, or insignificant); Duncan v. Walker, 533 (continued...)

2. The Tennessee Supreme Court has stated that Rule 39 merely "clarifies" what state law has been since before the promulgation of Rule 39. Indeed, the Tennessee Supreme Court has explicitly stated that Rule 39 was promulgated to clarify existing Tennessee practice. According to the Tennessee Supreme Court, Rule 39 was promulgated:

> to *clarify* that denial of relief by the Court of Criminal Appeals shall constitute exhaustion for federal habeas corpus purposes.

See App 68. As this Court has made manifest, a state ruling which "merely clarifie[s]" state law is "not new law" and therefore must be applied to a habeas petitioner's case. Fiore v. White, 531 U.S. 225, 228 (2001)(granting habeas relief by applying intervening decision of state supreme court which, according to state supreme court, merely clarified state law). That is the case here with Rule 39. Under Fiore, with the court of appeals having recognized that Rule 39 clarifies existing law (App. 13), the court of appeals' application of Rule 39 to Frank Adams' case was manifestly correct, and Petitioner's claims of "nonretroactivity" necessarily fail.

3. Finally, Petitioner's proposed interpretation of Rule 39 fails to come to grips with the purpose of the 1967 date contained in Rule 39. The Tennessee Court of Criminal Appeals was created in 1967 for the express purpose of "reduc[ing] the appellate backlog in criminal cases." App. 68. As the Tennessee Supreme Court has made clear in Rule 39, the Court of Criminal Appeals was not created to require two-tier review of every claim in every criminal or post-conviction case, but

---

[7](...continued)
U.S. 167, 174 (2001)("Were we to adopt respondent's construction of the statute, we would render the word "State" insignificant, if not wholly superfluous. 'It is our duty to give effect, if possible to every clause and words of a statute.")(internal quotations omitted); Williams v. Taylor, 529 U.S. 362, 404 (2000)(O'Connor, J., concurring); United States v. Menasche, 348 U.S. 528, 538-539 (1955); Inhabitants of Montclair Township v. Ramsdell, 107 U.S. 147, 152 (1883); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(proper interpretation of statute requires that no clause, sentence, or word be rendered superfluous, void, or insignificant).

for the precise opposite reason: To reduce the workload of the Tennessee Supreme Court. Petitioner's novel interpretation of Tennessee law proposes a completely contrary (and unsupported) view of Tennessee law, *viz.*, that the Court of Criminal Appeals was created to increase the workload of the Tennessee courts by requiring the Tennessee courts to review every claim in every criminal case not simply once, but twice.

In other words, if Petitioner were correct that Tennessee law required second-tier appellate review of all claims in all cases since 1967, by creating the Court of Criminal Appeals to hear appeals, the Tennessee Legislature necessarily desired two – not one – appeals of every claim in every case: One to the Court of Criminal Appeals accompanied (at least) by an application to the Tennessee Supreme Court. This has never been the policy of Tennessee. On the contrary, since1967, state policy has been exactly the opposite – to relieve the burden on the Tennessee Supreme Court by not requiring that court to review issues already reviewed once. App. 68. Petitioner's contrary interpretation of Rule 39 thus turns the express policy of Tennessee – fully expressed in the preamble to Rule 39 and Rule 39 itself – on its head.

In sum, as the court of appeals held, Rule 39 clarifies existing Tennessee law. Rule 39 expresses Tennessee policy since 1967, and by its express terms, it applies to all cases in which appeals have been filed since 1967. The court of appeals' interpretation and application of Tennessee law is manifestly correct – not only given the plain text of the Rule, but given the longstanding Tennessee policy embodied by Rule 39. Frank Adams is entitled to plenary review of his *Bruton* claim for these reasons, and all reasons contained in the record. Certiorari should be denied.

CONCLUSION

Petitioner asks this Court to review an interlocutory order concerning an interpretation and

application of state law, where the court of appeals was uniquely able to apply state law, and where nuances of Tennessee law were never presented or argued below. There is no conflict among the circuits, and the court of appeals' application of law is not only not clearly in error, it is correct. The petition for writ of certiorari should be denied.

Respectfully Submitted,

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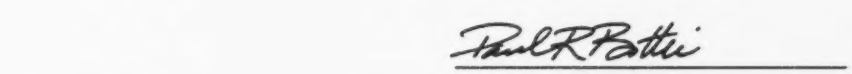
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief in opposition has been served via first-class mail postage prepaid upon Gordon Smith, Counsel for the Respondent, Office of the Attorney General, State of Tennessee, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 9th day of February, 2004.



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No. 03-821

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In The
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FLORA HOLLAND, WARDEN,

Petitioner,

v.

FRANK E. ADAMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In opposing certiorari, respondent argues that review is unwarranted because the case is in an interlocutory posture, there is no conflict among the circuits on the issues presented, the case involves only a routine application of a properly stated principle of law to the unique facts of this case, the Sixth Circuit is in a better position than this Court to interpret Tennessee law, and the decision below is correct.

None of those arguments is sound. Despite the fact that discretionary review by the Tennessee Supreme Court has been and plainly remains an established part of the normal appellate process in Tennessee and, thus, is a remedy to which a prisoner must resort in order to exhaust state remedies, *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), the Sixth Circuit has held that a rule adopted by the Tennessee Supreme Court, purporting to remove discretionary review as a prerequisite for exhaustion of state remedies, makes discretionary review unavailable for 28 U.S.C. § 2254 purposes. And, despite the fact that respondent failed to press his confrontation-rights claim to the Tennessee Supreme Court in his application for discretionary review eight years before the rule's adoption, the Sixth Circuit retroactively applied the rule to excuse respondent's procedural default. Because the Sixth Circuit has decided two important federal questions in a way that conflicts with *Boerckel*, this Court's review is warranted.

1. The fact that the court of appeals has remanded this case to the district court for further proceedings does

not present an impediment to immediate review.[1] Despite the interlocutory status of a case, this Court has granted certiorari when the opinion of the lower court has decided an important question – otherwise worthy of review – and intervention may serve to hasten or finally resolve the litigation. *See, e.g., Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994) (reversing court of appeals' decision setting aside district court's grant of summary judgment); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) (reversing court of appeals' decision setting aside district court's grant of motion to dismiss); *Estelle v. Gamble*, 429 U.S. 97 (1976) (reversing court of appeals' decision setting aside district court's dismissal of complaint for failure to state a claim).

For the reasons stated in the petition, the Sixth Circuit's decision raises two important questions worthy of the Court's consideration. And this Court's intervention may serve to hasten the litigation. The habeas corpus petition in this case was filed in 1999. The district court's grant of summary judgment on procedural default grounds correctly concluded the litigation in 2000. The federal habeas statute contemplates "a swift, flexible, and summary determination" of a petitioner's claims. *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973). But the Sixth

[1] Respondent suggests that the district court already has undertaken further proceedings on remand. While the mandate of the court of appeals has not been stayed, the district court has not ordered any further proceedings as yet. Respondent's motion to set a briefing schedule (R. 50), to which petitioner has filed a response in opposition, urging the court to await disposition of this petition for a writ of certiorari before ordering any further proceedings (R. 51), is under advisement by the district court.

Circuit's reversal, premised on an incorrect interpretation of this Court's precedent and requiring consideration of the merits of Adams' confrontation-rights claim now four years after the district court's final judgment, needlessly prolongs the litigation.

2. Respondent's contention that there is no conflict among the circuits concerning a state's ability to structure its own court system and identify available state remedies for purposes of exhaustion misapprehends petitioner's argument. First, it is this Court's decision in *Boerckel* with which the court of appeals' decision conflicts. *See* U.S.S.Ct. Rule 10(c). Second, the fact that other circuits have recognized that states may identify second-tier review by a state supreme court as being unavailable for exhaustion purposes beggars the question in this case: Does Rule 39 accomplish that result when the Tennessee Supreme Court has left in place Rule 11, Tenn.R.App.P., which provides for an application for permission to appeal in the Supreme Court and standards governing the grant of review of such applications, and has published the Rules' advisory commission comments explaining that Rule 39 "works no change to T.R.A.P. 11 itself?" Finally, the lower courts *are* in conflict on the second question presented in the petition: whether retroactive application of Rule 39 conflicts with *Boerckel*. *See, e.g., Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001) ("if a remedy was available . . . at some time in the past, it is difficult to see how that fact can be retroactively altered"); *Mattis v. Vaughn*, 128 F.Supp.2d 249, 262 (E.D. Pa. 2001) (retroactive application would "greatly increase" burden on federal courts without affording relief to state supreme court's docket).

3. Respondent's contention that the petition merely requests application of a properly stated rule of law to

unique facts again demonstrates a misunderstanding of petitioner's argument. The Sixth Circuit has not merely misapplied a settled principle of law; it has created a new rule, one that is clearly contrary to *Boerckel*'s holding that prisoners must resort to discretionary review if such review is an "established part of the State's appellate review process." *Boerckel*, 526 U.S. at 845. The court of appeals' decision makes efficacious a state supreme court's mere declaration that it deems discretionary review "unavailable," despite the plain fact that discretionary review obviously remains available to each and every litigant passing through the Tennessee courts. Such blind deference to a state court's recitations has never been countenanced by this Court. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958) (certiorari jurisdiction not defeated if nonfederal ground relied on by state court is without any fair or substantial support).

4. Respondent's suggestion that this Court should defer to the court of appeals' "interpretation" of Tennessee law is likewise misplaced. Petitioner is not asking this Court to interpret Rule 39. The rule is clear enough on its face. Rather, the question petitioner has posed is whether, under this Court's precedent, Rule 39 *can* make discretionary review "unavailable" for federal habeas purposes merely by declaring that as its objective, and, even if it can, whether the rule may be retroactively applied to resurrect a claim that was clearly procedurally defaulted at the time state collateral review of respondent's conviction and sentence was concluded. Thus, there is no need to resolve any "nuances" of state law or a need for "greater familiarity" with issues of state law in order to decide this case. And, contrary to respondent's assertion, Br. in Opp. 6-7, petitioner has not waived reliance on the Tennessee

rules, advisory commission comment, and several reports urged in support of its position. These authorities are relied on to support a consistent argument – made both in the court of appeals and in this Court – that Rule 39 does not and cannot as a matter of law render discretionary review unavailable for exhaustion purposes. Thus, these authorities are properly presented. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (since petitioners "raised a taking claim in the state courts, they could have formulated any argument they liked in support of that claim here").

5. Respondent contends that the Sixth Circuit's interpretation and application of Tennessee law is correct, arguing that Rule 39 on its face applies to all appeals from and after July 1, 1967, was promulgated by the Tennessee Supreme Court to clarify that denial of relief by the Court of Criminal Appeals constitutes exhaustion for federal habeas corpus purposes, and was intended to reduce the appellate backlog in criminal cases. But this argument misses the mark. Petitioner takes as a given the plain wording of the rule and what the Tennessee Supreme Court intended to accomplish by its adoption, and petitioner fully recognizes that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." *Boerckel,* 526 U.S. at 847. The issue, however, is whether Rule 39 can be held to have accomplished its goal to make discretionary review unavailable when it patently remains an established part of the state's appellate review process, which, under *Boerckel*'s clear holding, a prisoner must pursue in order to exhaust state remedies.

Respondent does not attempt to square the Sixth Circuit's decision with *Boerckel*. He cannot. Rule 11

discretionary review remains in the arsenal of remedies available to all Tennessee litigants, and the Tennessee Supreme Court, after the adoption of Rule 39, continues to afford relief to criminal litigants whose "right to seek second-tier review pursuant to Tennessee Rule of Appellate Procedure 11" has been denied. *State v. Evans*, 108 S.W.3d 231, 234 (Tenn. 2003).

Under 28 U.S.C. § 2254, a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Rule 11 review remains an established part of Tennessee's normal appellate review process. *Boerckel* therefore commands that the remedy be exhausted, despite the Tennessee Supreme Court's effort to circumvent that requirement.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MEMORANDUM OF PETITIONER

Petitioner files this memorandum to advise the Court of certain facts arising after the filing of petitioner's reply brief. On February 23, 2004, in compliance with the court of appeals' remand for consideration of respondent's confrontation-rights claim on its merits, the district court entered a memorandum denying relief on the merits of the claim and ordered the petition for a writ of habeas corpus dismissed. Despite this development, this Court's review of the court of appeals' decision, reversing the district court's earlier dismissal on procedural default grounds, still may serve to hasten the litigation in this case. In all likelihood, respondent will appeal the district court's recent decision, resulting in another unnecessary round of appellate litigation in this five-year-old habeas case. For the reasons stated in the petition, the court of appeals' decision raises two important questions worthy of this Court's immediate consideration. Therefore, review by this Court remains warranted.

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